TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible]

No. 558.

GEORGE W. BOND ET AL., APPELLANTS,

vs.

UNKNOWN HEIRS OF [illegible] ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

[illegible]

(23,068)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 558.

GEORGE W. BOND ET AL., APPELLANTS,

vs.

UNKNOWN HEIRS OF JUAN BARELA, DECEASED, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1912

1 Be it Remembered, that heretofore, on to-wit, *on* the 4th day of March, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record in a certain cause therein pending, entitled, George W. Bond, et al., Appellants, vs. Unknown Heirs of Juan Barela, deceased, et al., Appellees, and numbered 1384, which said transcript of record was, and is in the following words and figures, to-wit:

2 *Transcript of Record.*

From the District Court of the Seventh Judicial District of the Territory of New Mexico within and for the County of Valencia.

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Hanna & Wilson, Santa Fe, New Mexico, Attorneys for Appellants.

Filed in my office this 4th day of March, 1911.
JOSE D. SENA, *Clerk.*

In the District Court of the Seventh Judicial District of New Mexico for the County of Valencia, New Mexico.

No. 1709. Civil.

GEORGE W. BOND, FRANK BOND, PETRA BUENAVENTA, CIPRIANO Sisneros, Jose Lucero y Romero, Antonio Montoya, Julianita Otero y Lucero, Nemecia Romero de Garcia, Ross Garcia, Victor Lucero y Romero, Adolfo Salas, Trinidad Buenaventa, Jose Gabaldon, Anastacio Torres y Mirabal, Juan Zamora y Sedillo, Jose Zamora y Candelaria, Alcario Zamora y Candelaria, Evarista Buenaventa, Benigno Gonzalez, Eligio Salaz, Juan Jose Archuleta, Tomas Sabedra, Virginia Buenaventa de Zamora, Venceslao Buenaventa y Fresquez, Alcario Zamora, Evarista Buenaventa, Martina Romero, Romana Romero, Leandra Romero, Paz Zamora, Antonio Baca, Juan Pablo Sedillo, Olimpia Aragon de Salas, Jose Lino Salas, Roque Candelaria, Juanito Sanchez y Salaz, Jose Sanchez, S. Salurina Sanchez, S. Bernabel Sanchez, S. Teodora Sanchez, S. Jose N. Sisneros, Martin Ilicio, Canuto Lopez, Serafico Romero, Amada Romero, Sirila Romero, Francisco Lopez, Lasara Herrera Vallegos, Jesus Ma. Padia y Baldonado, Isabel Zamora, Gil Perea, Plutarco Sisneros, Jose Maria Romero y Miraval, Doroteo Torres,

3

Daniel Torres, Roman Torres y Sanches, Ana Maria Gonzalez, Manuel Maestas, Beatriz N. Kelley, J. B. Kelley, Primitiva Perilla, Remejio Zamora, Bedal Zamora, Seferina Sais y Montaño, Nicanor Zamora, Delvina Sabedra, Maria F. M. Sebedra, Candelario Sabedra, Anrringus Sabedra, Eleturio Sabedra, Jose Antonio Romero, Lucas Zamora, Benigno Sedillo, Rafael Sedillo, Candelario Sias, Derederia Sedilla, Federico Sedillo, Felimino Sanches, Eugenio Sanches, Jesus Sanches, Juan Sanches, Rafael Sanches, Tomaza Sanches, Julian Sanches, and Manual Sanches, Plaintiffs,

vs.

The Unknown Heirs of Juan Barela, Deceased; The Unknown Heirs of Joseh Salas, Deceased; The Unknown Heirs of Juan Ballejos, Deceased; The Unknown Heirs of Manuel Carrilio, Deceased; The Unknown Heirs of Juan Montaño, Deceased; The Unknown Heirs of Domingo Sedillo, Deceased; The Unknown Heirs of Matias Romero, Deceased; The Unknown Heirs of Bernardo Ballejo, Deceased; The Unknown Heirs of Gregorio Jaramillo, Deceased; The Unknown Heirs of Francisco Sanches, Deceased; The Unknown Heirs of Pedro Romero, Deceased; The Unknown Heirs of Felipe Barela, Deceased; The Unknown Heirs of
4 Lugardo Ballejos, Deceased; The Unknown Heirs of Agustin Gallegos, Deceased; The Unknown Heirs of Alonzo Perea, Deceased; The Unknown Heirs of Thomas Samora, Deceased; The Unknown Heirs of Nicolas Garcia, Deceased; The Unknown Heirs of Ignacio Baca, Deceased; The Unknown Heirs of Salvador Manuel, Deceased; The Unknown Heirs of Francisco Silva, Deceased; The Unknown Heirs of Francisco Rivera, Deceased; The Unknown Heirs of Juan Antonio Samora, Deceased; The Unknown Heirs of Miguel Lucero, Deceased; The Unknown Heirs of Joachin Sedillo, Deceased; The Unknown Heirs of Simon Samora, Deceased; The Unknown Heirs of Xpritoval Gallegos, Deceased; The Unknown Heirs of Juan Ballejos Grande, Deceased; The Unknown Heirs of Jacinto Barela, Deceased; The Unknown Heirs of Diego Gonzales, Deceased; The Unknown Owners of the Premises Described in the Complaint of Plaintiffs in This Cause, The Unknown Proprietors of the Premises Described in said Complaint, The Unknown Owners or Proprietors of the Premises Described in said Complaint, and The Unknown Claimants of Interests in the said Premises Adverse to said Plaintiffs, Defendants.

And plaintiffs for their cause of action state:

1st. That on to-wit the 5th day of April, A. D. 1871, the United States issued and delivered in due form of law its patent for a certain grant and tract of land situated in the County of Valencia, in the Territory of New Mexico, commonly called the Tome Grant or the Town of Tome grant, more particularly described in said patent by said United States as:—

Lot number thirty-seven in township four north of range two east.
Lot Number thirty-seven in township five north of range two east.

Lot number thirty-seven in township six north of range two east.

Lot number thirty-seven in township four north of range three east.

Lot number thirty-seven in township five north of range three east.

Lot number thirty-seven in township six north of range three east.

Lot number thirty-seven in township four north of range four east.

Lot number thirty seven in township five north of range four east.

Lot number thirty-seven in township six north of range four east.

New Mexico Meridian, according to the public surveys of the United States in the Territory of New Mexico, a true copy of which said patent is hereto attached as Exhibit No. 1 and here made a part of this complaint; and said land being more particularly bounded and described in the survey of said grant and tract of land by the United States as follows, to-wit:

North Boundary.

Commencing at a mound of stones around a large stone marked thus ....., at a point of a marsh at the hill called Tome Dominguez on the north boundary of said grant, and tract, and thence running west, at 1.50 chains enter open pond, at 4 chains leave open pond on S. side, at 34.75 ch. a slough of running water bears E. of N. & W. of S. 30 chs. wide, at 40 chs. a mound of earth, at 59.25 chs. a road bears E. of W. and W. of S., at 1 mile a mound of earth, and at 1 M. 21 chs. to a marsh bears E. of N. and W. of S., at 1 N. 28 chs. leave Marsh, at 1 M. 28.50 chs. an acequia, at M. 34 chs. another acequia, at 1 M. 37.50 chains the Rio Grande or Rio del Norte, to a large mound of earth and the northwest corner of the Tome grant. Thence running to point of commencement and beginning at the mound at the point of marsh or pond 1 M. 37.30 chs. east of Rio Grande *por* Rio del Norte and of the north west corner of the grant and tract of land, counting distances from mound on bank of Rio Grande on a true line east along north boundary (variation 13 east), and running thence east counting from mound on Rio Grande, at 2 miles a stone with a mound of sod, at 2 M. 05 chs. leave swamp and pass E. end of hill or stony ridge about one hundred feet high called Tome Dominguez at 2 M. 40 chs. to a mound of earth, at 3 M. a set stone with mound of earth, at 3 M. 40 chs. a mound of earth on a deposit of stones, at 4 M. 40 chs. a mound of earth, at 5 M. a set stone with a mound of earth, at 5 M. 40 chs. a mound of earth, at 6 M. a mound of earth on a deposit of stones, at 6 M. 40 chs. a mound of earth, at 7 M. a mound of earth, at 7 M. 40 chs. a mound of earth, at 8 M. a mound of earth, at 8 M. 40 chs. a mound of earth *at* 9 M. a mound of earth, at 9 M. 19.50 chs. a trail bears N. W. & S. E.

at 9 M. 40 lks. a mound of earth, at 9 M. 56 chs. a trail bears N. W. and S. of E., at 10 M. a mound of earth on a stone, at 10 M. 40 chs. a mound of earth, at 10 M. 56 chs. ascend 10 feet, cottonwoods, springs, houses or huts, one to two miles south, at 11 M. E. a set stone with mound of earth, at 11 M. 40 chs. a mound of earth, at 12 M. set stone with mound of earth, at 12 M. 40 chs. a mound of earth, at 13 M. a mound of earth on deposit of stones, at 13 M. 40 chs. a set stone with a mound of earth, at 14 M. a mound of stone and earth, at 14 M. 40 chs. a mound of stone at 15 M. 10 chs. commence to ascend mountains, at 15 M. 20 chs. a set stone with a mound of stones on side of mountain for the north-east corner of the said Tome grant and tract of land.

East Boundary.

Commencing at said northeast corner of this grant and tract and 15 N. and 20 chs. from the Rio Grande and the N. W. corner
7 of tract, thence meandering along Sandia Mountains S. 497 chs., at 5 M. 21 chs. to a fine stream of excellent water 15 lks. wide, course north of west, coming down from a mountain gorge; thence S. 50° west 17 chs., thence S. 43° W. 337 chs., at 123.50 chs. on this course a stream 10 lks. wide, course W.; thence S. 21¼° W. 74 chs. thence S. 11° E., 55 chs.; thence S. 58° E. 41 chs.; thence S. 12½° E. 29 chs.; thence S. 57° E., 9.20 chs.; thence S. 73° E., 9 chs., thence S. 10° E. 16 chs; thence S. 54° W.; 19 chs.; thence 10½° E., 135 chs. to mound at foot of mountain; and the southeast corner of this Tome grant and tract of land.

West Boundary.

Commencing at the N. W. Cor. mound of this grant and tract on Rio Grande, and thence meandering said river down stream on west boundary of grant and tract, S. 5½ S. W.; 20 chs; thence S. 11¾° W., 15 chs; thence S. 16° W. 21 chs; thence S. 2¾° 10 chs, (a mile a few chains east,) thence S. 11¾° E., 6.50 chs; thence S. 2° E. 6 chs; thence S. 6° W., 10 chs; thence S. 9¼° W. 25 chs; thence S. 21½ E. 15.50 chs; thence S. 7¼° E., 10 chs; thence S. 9° W. 18 chs; thence S. 6° W. 38 chs; thence S. 42° E. 6.50 chs; thence S. 13° W. 10 chs; thence S. 23½° W. 8 chs; thence S. 54° W. 8 chs; thence S. 76½ W. 15 chs; thence S. 52¾° W. 6 chs; thence S. 8° W. 14 chs; thence S. 45° W. 9 chs; thence S. 25½° W. 6.50 chs, thence S. 5½° W. 10 chs; thence S. 11 chs; thence S. 34¼° W. 14 chs; thence S. 13½° E. 17.50 chs; thence S. 23½° E. 4 chs; thence S. 44° E.; 4 chs; thence S. 46¾° E. 13 chs; thence S. 10½° E. 3 chs; thence S. 15° W., 4 chs; thence S. 2° E. 12 chs; thence S. 37° E. 15 chs; thence S. 27¼° E. 50 chs; thence S. 7 chs; thence S. 34° W. 14 chs; thence S. 61¾° W. 19 chs; thence S. 29¼° W. 12 chs; thence S. 15 W. 22 chains; thence S. 8° W., 7.50 chains; thence S. 20° W. 18.50 chains; thence S. 13.50 chains; thence S. 26½°
8 E. 46 chains; thence S. 43° E. 16 chains; thence S. 10½° E. 15chs; thence 39¾° E. 5.50 chs; (at 4 chs. to mouth of — also

comes from mouth 60 chs. wide) thence S. 28½° E. 9 chs; thence S. 3½° E., 17 chs; thence S. 18° E. 13 chs; (road near river), thence S. 7½° E. 16 chs; thence S. 8° W. 25 chs; thence 37° W. 12.80 chs; thence S. 25½° W. 12 chs; thence S. 47½° W. 8.50 chs; thence S. 44¼° W. 11 chs; thence S. 21½° W. 13 chs; thence S. 32¾° W. 21.50 chs; thence S. 23° W. 15 chs; thence S. 19° W. 17 chs; thence S. 25¼° W. 13.50 chs; thence S. 26½° E. 29 chs; E. 23½° E. 70 chs; (at 40 chs. left bottom), (on this course connection made of this survey with public surveys, this course at 56.85 chs. intersecting south boundary of T. 5 N. R. 2 E. 59.50 chs; west of corner to sections 33 and 34;) thence S. 14° W., 23 chs; thence S. 13½° W. 17.30 chs; thence S. 30¼° W. 14 chs; thence W.; 18 chs; thence S. 66½° W. 6.50 chs; thence S. 35° W. 24 chs; thence S. 26½° W. 19 chs; thence S. 54½° W. 14 chs; thence S. 68° W. 1050 chs; thence S. 12° W. 13 chs; thence S. 25½° W. 13.50 chs; thence S. 54° W. 10 chs; thence S. 19° W. 32 chs; thence S. 6½° W. 7 chs; thence S. 21¼° W. 7.08 chs. to S. W. corner, this grant and tract.

South Boundary.

Commencing at the S. W. corner this grant and tract, and thence running due east at 64.30 chs. a house which pass by offset. at 66.50 chs. a road bears N. & S., at 1 M. a mound of earth; at 1 M. 40 chs. a mound of earth; at 2 M. a large mound of earth; variation 13° 35 E., at 2 M. 40 chs. a mound of earth; at 3 M. a mound of earth; at 3 M. 40 chs. a mound of earth; at 4 M. a mound of earth; at 4 M. 40 chs. a mound of earth; at 5 M. a mound of earth; at 5 M. 40 chs. a mound of earth; 56.80 a wagon road bears N. W. & S. E.; at 6 M. a mound of earth; at 6 M. 40 chs. a mound of earth; at 7 M. a mound of earth; at 7 M. 40 chs. a mound of earth; at 8 M. a mound of earth; at 8 M. 40 chs. a mound of earth; at 9 M. a mound of earth; at 9 M. 40 chs. a mound of earth; at 10 M. a mound of earth; at 10 M. 40 chs. a mound of earth; at 11 M. a mound of earth; at 11 M. 40 chs. a mound of earth; at 12 M. a mound of earth and stones; at 12 M. 40 chs. a mound of earth and stones; at 13 M. a mound of earth and stones; at 13 M. 40 chs. a mound of stones; at 14 M. a mound of stones; at 14 M. 40 chs. a mound of stones; at 15 M. a mound of stones; and at 15 M. 20 chs. a large mound of stones on mountain side 100 links N. of small stream of water which runs west and the southwest corner of this grant and tract and fifteen miles and twenty chains west of southwest corner on Rio Grande of Tome Grant and tract of land, the said grant and tract of land containing one hundred and twenty-thousand five hundred and ninety-four acres ad 53-100 acres.

2nd. That the plaintiffs are the owners in fee simple and in common of an undivided one-half share, part and interest in said grant and tract of land.

3rd. That plaintiffs are informed and believe that Juan Barela, Joseh Salas, Juan Ballejos, Manuel Carrillo, Juan Montaño, Domingo Cedillo, Mateas Romero, Bernardo Ballejos, Gregorio Jaramillo, Francisco Sanchez, Pedro Romero, Phelipe Barela, Lugardo Ballejos,

Augustin Gallegos, Alonzo Perea, Tomas Samora, Nicolas Garcia, Ignacio Baca, Salvador Manuel, Francisco Silva, Francisco Rivera, Juan Antonio Zamora, Miguel Lucero, Joahin Sedillo, Simon Samora, Xpritoval Gallegos, Juan Ballejos grande, Jacinto Barela and Diego Gonzales, all now deceased, formerly had and owned an undivided part, share and interest in common and in fee simple in said grant and premises and were all and severally interested in said grant and tract of land, and their respective heirs, assigns and legal representatives, now claim in common and fee simple, or
10 otherwise, some undivided part, share and interest in said grant, premises, and real estate, but the respective names and places of abode and residence of all and any of said heirs, assigns, and legal representatives of said deceased persons and the amount of their respective share or quantity of interests and ownership in said grant, tract of land and real estate are unknown to plaintiffs.

4th. That plaintiffs are informed and believe that there are divers unknown owners and proprietors of said premises, grant and tract of land and real estate, and divers unknown claimants of interest in said premises adverse to said plaintiffs, and divers unknown persons interested in said premises, grant and tract of land and real estate, and divers persons who may claim some interest in said premises, but the respective part, share and quantity of interest in, and the respective names and residences of each, all or any of said unknown owners, proprietors, claimants and persons are unknown to said plaintiffs; and plaintiffs by reason thereof are unable to state the names of said unknown heirs, owners, proprietors or claimants of interest adverse to plaintiffs or persons interested in said premises, and do not know and cannot describe or set forth the separate parts, shares and quantity of interest in said premises of them or any of them, respectively; and all the said unknown heirs, assigns and legal representatives of said deceased persons, and all the said unknown owners of said premises aforesaid, and all the said unknown proprietors of said premises, and all the said unknown owners or proprietors of said premises and tract of land aforesaid, and all the unknown claimants of interest in said premises adverse to said plaintiffs, and all the said unknown persons interested in said premises are here made parties defendant to this said plaintiffs' said
11 complaint in this action and to this said cause and suit.

5. Plaintiffs are credibly informed and believe that de- are here made parties defendant to this said plaintiffs' said in the said premises.

6th. Plaintiffs desire a division and partition of the said premises according to the respective interests in said premises, but are and have been unable to agree upon such division and partition.

Plaintiffs therefore pray:

1st. That the unknown heirs of said deceased persons as aforesaid, the said unknown owners and proprietors of said premises and the said unknown claimants of interest in said premises adverse to plaintiffs may be made parties defendant in this complaint.

2nd. That the respective rights, titles and interests of each of the parties hereto plaintiffs and defendants, in and to said grant, tract

of land and real estate may, by the order, judgment and decree of this court, be found and decreed according to law and the practice of this court.

3rd. That when so found, as aforesaid, the said grant, tract of land and real estate may, by the order, judgment and decree of this court, be divided and partitioned according to the respective rights of the owners thereof.

4th. That if it should appear that partition and division in kind of said grant, tract of land and real estate cannot be made without manifest prejudice to the owners or proprietors of said premises, that then said real estate and premises may be sold as the court shall direct, and the proceeds of such sale divided between the parties in interest herein, according to their respective rights and ownership.

5th. That the plaintiffs' estate in said lands and premises may be established against the adverse claims thereto as aforesaid,
12 and the defendants barred and forever estopped from having or claiming any right, or title to the premises adverse to plaintiffs; and that plaintiffs' title thereto may be quieted and set at rest.

6th. That the plaintiffs may have such other and further relief in the premises as to the court shall seem just and proper.

(Signed) EUGENE A. FISKE,
Attorney for Plaintiffs.

Whose postoffice address and residence is Santa Fe, N. M.

21841 I.
B.
M. F. H.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, *August* 4, 1909.

I hereby certify that the annexed copy of patent is a true and literal exemplification from the record in this office.

In testimony whereof; I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

[SEAL.] H. W. SANFORD,
Recorder of the General Land Office.

EXHIBIT No. 1.

288.
Patent sent to Sur. Genl. of New Mexico, April 5, 1876.
Ex'd.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, the land claim of the town of Tome in the Ter-
13 ritory of New Mexico is duly entered as number two in the report dated the thirtieth day of September, one thousand eight hundred and fifty-six, of the United States Surveyor General for said Territory, is there favorably reported upon, and has since

been confirmed by the Act of Congress approved December 22d, 1858, entitled "An act to confirm the Land Claim of certain Pueblo sand Towns in the Territory of New Mexico;"

Tome Claim.

And Whereas, there has been deposited in the General Land Office of the United States a return within plat of the survey of the said claim, confirmed as aforesaid, authenticated on the 5th day of June, 1861, by the signature of the United States Surveyor General of the Territory of New Mexico, whereby it appears that said claim has been designated as Lot number thirty-seven in Township four North, of Range two east, Lot number thirty seven, in Township five North, of Range two east, Lot number thirty seven in Township six North, of Range two east, Lot number thirty-seven, in Township four North, of Range three East, Lot number thirty-seven in Township five North, of Range three East, Lot number thirty-seven in Township six North, of Range three East, Lot number thirty-seven in Township four North, of range four East, Lot number thirty-seven in Township five North, of Range four East, and Lot number thirty-seven in township six North, of Range four East of the New Mexico Meridian, containing one hundred and twenty-one thousand five hundred and ninety-four acres and fifty three hundredths of an acre, situated in the Territory of New Mexico, the plat in the aforesaid return of survey being in the words and figures as follows, to-wit:

Now Know Ye, That United States of America, in consideration of the premises and in conformity with the Act of Congress
14 aforesaid, Have Given and Granted, and by these presents Do Give and Grant, unto the said "Town of Tome," and to the successors and assigns of the said "Town of Tome," the tract of land embraced and described in the foregoing survey, but with the stipulation as expressed in the said Act of Congress 'that this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights should such exists.

To Have and to Hold the said tract with the appurtenances unto the said Town of Tome and to the successors and assigns forever of said town, with the stipulation aforesaid.

In testimony whereof, I, Ulysses S. Grant, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington this fifth day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-fifth.

U. S. GRANT.

By the President: *By* J. BARRISH,
Secretary.

J. M. GRANGER,
Recorder of the General Land Office.

M. L. 218,411.

(Endorsed on back:) No. 1709. District Court, Valencia County, Territory of New Mexico. Civil. George W. Bond, et al., Plaintiffs, vs. The Unknown Heirs of Juan Barela Deceased, et al., Defendants. Complainant. Filed in my office this 8th day of July, 1910. S. B. Newcomb, Clerk. Eugene A. Fiske, of Santa Fe, New Mexico, Attorney for Plaintiffs.

In the District Court, County of Valencia, Territory of New Mexico.

GEORGE W. BOND et al.
vs.
THE TOWN OF TOME et al.

Answer.

Now comes the Town of Tome, by its attorney, and for answer to complaint in the above entitled cause shows to the court the following:

1. This defendant admits the allegations of the first numbered subdivision of said complaint, but in addition thereto avers that the patent issued by the United States on the 5th day of April, 1871, for the tract of land commonly called the Town of Tome Grant, was issued to the Town of Tome, as appears by reference to the copy of said patent attached to said complaint.

2. This defendant denies that the plaintiffs are the owners in fee simple and in common or in any other manner, of an undivided one-half share, part, and interest, or of any other share, part or interest, in said grant and tract of land.

16 3. This defendant denies, upon information and belief that Juan Barela and the other persons mentioned in the third subdivision of said complaint, ever had or owned an undivided part, share, or interest, in common and in fee simple, in said grant and premises, but it admits that they were all severally interested in said grant and tract of land as hereinafter set forth, and defendant admits that some of the heirs, assigns, and legal representatives of said persons now claim some undivided interest in said grant.

And this defendant, by way of new matter, and as a defense to action of plaintiffs and as a showing why plaintiffs are not entitled to the relief prayed in their complaint, shows to the court the following:

a. In the year 1739, the persons named in the third numbered subdivision of said complaint, petitioned the then Governor and Captain-General of the Kingdom of Mexico, for a grant to them of the land called Tome Dominguez, declaring themselves willing to settle upon the same within the time prescribed by law, and thereafter the said Governor and Captain-General granted to said persons the land petitioned for, called the Land of Tome Dominguez, for themselves, their successors, and whoever may have a right thereto under the conditions and circumstances required in such cases, declaring *that* the same to be without prohibition to any one

desiring to settle the same, and ordered that judicial possession be given to said persons, giving in all cases to each one the portion he may be entitled to; and upon the 30th of July, 1739, the Senior Justice and War Captain of the Villa de San Felipe de Albuquerque, in obedience to the order of said Governor, delivered possession to said persons and assigned to each of them in severalty a sufficient quantity of land to plant one fanega of corn, two of wheat,
17 a garden, and house lot, the said land of Tome Dominguez being the same tract of land described and set forth in said complaint, and the patent, copy of which is attached thereto.

b. In the year 1856, the inhabitants of Tome, by their attorney, presented a petition to the Surveyor-General of the Territory of New Mexico, in accordance with the instructions of the Department of the Interior, giving in obedience to the requirements of the 8th section of the act of Congress July 22, 1854, entitled, "an act to establish the offices of Surveyor-General of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein and for other purposes," asking for the recognition and perfecting of the title to said land under said act of Congress; and on September 2, 1856, the said Surveyor-General of New Mexico made his decision, approving said grant to the said Town of Tome, and recommending the Congress of the United States to confirm the same, copies of which petition and decision are attached hereto and made a part hereof.

c. The Congress of the United States in 1858 passed an act entitled, "an act to confirm the land claim of certain pueblos and towns in the Territory of New Mexico," which became a law December 22, 1858, by which it was enacted that the claim of the Town of Tome reported upon favorably by the Surveyor-General of New Mexico in his report of the 30th of September, 1856, to the Department of the Interior, was confirmed, and that the commissioner of the Land Office should issue instructions for the survey of said claim as recommended for confirmation by the said Surveyor-General, and should cause a patent to be issued therefor, as in ordinary cases to private individuals; and this defendant avers that the patent mentioned and referred to in the complaint in this cause was issued in pursuance of the authority and direction con-
18 tained in said last mentioned act of Congress.

d. Under the Spanish and Mexican governments the Town of Tome was a regularly organized and existing municipality, with a town council, and the officers provided and required by the Spanish and Mexican laws.

e. In the year 1892, proceedings were begun in this court upon the petition of Jose I. Salazar and others, under the provisions of an act of the Legislative Assembly of the Territory of New Mexico, entitled "An Act relating to community land grants, and for other purposes," which became a law February 26, 1891, for the purpose of incorporating the Town of Tome Land Grant. Thereafter such proceedings were had in this court in full conformity with said law, that on September 12, 1892, by the judgment and decree of this court, the prayer of the said petition was granted, and the pe-

titioners and their associates, the owners and proprietors of the said Town of Tome Land Grant, were created a body politic and corporate under the name of "The Town of Tome," all of which will more fully and at large appear by reference to the files and records of this court, in the case numbered 1166 on the civil docket of this court, entitled "In the Matter of the Incorporation of the Town of Tome Land Grant;" and this defendant avers that it is the corporation so created; that the said decree of this court was final and conclusive, and operated to vest in this defendant the legal and equitable title to all the land within the exterior boundaries of such grant mentioned in the complaint herein, to which said town or community was entitled at the time of the passage of said act, and this defendant was thereby vested with full power and authority to manage and dispose of any and all of such lands in accordance with the provisions of said act, the only lands
19 therein which did not come under the power and control of this defendant being those held in private ownership.

f. This defendant further alleges that there are about four hundred or more persons holding lands in severalty and private ownership within the limits of said grant, as set forth in said complaint, and that those lands so held and owned in severalty are the individual separate property of their respective owners, and in no way subject to any claim by plaintiffs or any other person, and cannot be subject to partition as prayed in said complaint.

g. This defendant further alleges that all of the lands in said grant not held and owned in severalty as in the last paragraph stated, have been, ever since the title thereto vested in this defendant, as herein before stated, in the year 1892; held and claimed by this defendant, and that no claim by suit in law or equity effectually prosecuted has been set up or made to the said lands within the time aforesaid, but that during the whole of said time this defendant has been in the open, notorious, exclusive possession of all of said lands adverse and hostile to the whole world, and that it is the sole owner of said lands, and that plaintiffs and all other persons have no lawful right to set up any claim of title or ownership to the same or to any interest therein, or lawfully claim any right to a partition thereof, as this defendant holds and owns the same in accordance with the provisions of said act of the legislative assembly of New Mexico of 1891.

Wherefore, this defendant prays that the said complaint may be dismissed at the cost of plaintiffs.

THE TOWN OF TOME,
By FRANCISCO PADILLA,
President of its Board of Trustees.

FRANK W. CLANCY,
Attorney for Defendant.

20 TERRITORY OF NEW MEXICO,
County of Valencia:

On this 21st day of September, 1910, before me, a notary public, in the aforesaid county, personally appeared Francisco Padilla, who, being duly sworn, on his oath says that he is the president of the Board of trustees of the Town of Tome, that he has read over the foregoing answer signed by him, and knows the contents thereof, and that the same is true, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] FRANK G. FISCHER,
Notary Public.

My commission expires April 18, 1914.

TERRITORY OF NEW MEXICO,
Santa Fe County:

To the Hon. William Pelham, surveyor-general of the Territory of New Mexico:

Your petitioners, the inhabitants of the sitio of Tome, in the County of Valencia, New Mexico, would respectfully state to you, that in the year 1739 one Juan Barela and others petitioned one Gaspar Domingo Mendoza, then captain-general and governor of the province of New Mexico, under the crown of Spain, for a grant of the sitio of Tome Dominguez. Your petitioners would further state, that said petition was duly presented, and being fully considered by said governor, a grant of land was made to said petitioners on the 30th day of July, 1739, called the sitio of Tome Dominguez, situate now in the County of Valencia, and bounded on the west by the Rio del Norte; on the south by the stopping place called the Three Trees; on the east with the Sierra Madre, called Sandia; and on the north by la Punta de los Esteros del Serro que llaman
21 de Tome Dominguez; which said grant was made to said petitioners and their heirs in fee, and was duly taken possession of by said grantees, in accordance with the forms of law then in force, and has ever since that time been in the quiet and peaceable possession of said grantees, their heirs and assigns, without any adverse claim of any kind from any source whatever. Your petitioners further state that the town of Tome is situated on said grant, and the residence and farms of your petitioners, who have inherited the same from the original grantees, or acquired them by purchase. Your petitioners further state that they are not able to state the number of leagues contained within the boundaries of said grant, as no survey of the same has as yet ever been made, but the boundaries mentioned in said grant are well known and easily identified.

Your petitioners, the inhabitants of said sitio, to the end that their title may be recognized and perfected under the act of Congress, in each case made and provided, herewith present a copy of said grant

for your consideration, and report marked with the letter (W). All of which is respectfully submitted.

THE INHABITANTS OF TOME,
By JOHN S. WATTS, *Attorney*.

TOWN OF TOME,
SURVEYOR-GENERAL'S OFFICE,
SANTA FE, NEW MEXICO, *September* 2, 1856.

The claim to this town was filed in this office on the 6th day of August, 1856.

In the year 1739 Juan Barela and others petitioned Juan Ganzales Baz, the senior justice of the town of Albuquerque, to grant them a tract of land which had been previously granted to one Tome Dominguez, and which grant had been revoked by the governor and captain general.

22 This petition was referred by the Senior justice on the second day of July, 1739, to Gaspar Domingo de Mendoza, governor and captain-general of the Territory, who granted them the lands in the name of his majesty; and on the 30th day of July, 1739, Juan Gonzales Baz, senior justice and war-captain of the town of San Philipe de Albuquerque, and the districts under its jurisdiction, placed the said Barela and companions in possession of the land so granted, with the following boundaries: On the west, the Del Norte River; on the south, the place commonly called "Los Tres Alamos;" on the east, the Sierra Madre, called Sandia; and on the north the point of the marsh of the hill called Tome Dominguez.

The original grant of the land embraced in this claim was selected from the archives of the Territory found at this place, but in so dilapidated a condition, and so much eaten by mice, that it is not legible. This office has, therefore, acted upon a certified copy made in the year 1836, filed by the claimant.

The signatures of the governor and captain general on the original grant, on comparison with others of the same officer in this office, appears to be genuine, and the boundaries on the original are complete, and correspond with those on the copy.

The heirs and successors of the parties to whom this grant was made have been in the peaceable possession of the land for one hundred and seventeen years, without any adverse claim from any person whatsoever.

The decree and orders of the King of Spain, and the recapitulation of the Indians, conferred upon the governors of territories under its jurisdiction the power of distributing the public lands, and this grant was made in pursuance of the power so vested; and the grant to the said town of Tome is therefore approved, and the Con-

23 gress of the United States respectfully recommended to confirm the same, causing a patent to issue therefor by the proper department, and that the land embraced within the limits set forth in the grant be surveyed.

WM. PELHAM,
Surveyor-General of New Mexico.

(Endorsed on back:) No. 1709. District Court, Valencia County. George W. Bond et al. vs. The Town of Tome et al. Answer of the Town of Tome. Filed in my office this 21 day of Sept., 1910. W. D. Newcomb, Clerk.

In the District Court, County of Valencia, Territory of New Mexico.

GEORGE W. BOND et al.
vs.
THE TOWN OF TOME et al.

Answer.

Now comes Doroteo Chaves, and 391 others, whose appearance has been heretofore entered in this cause as defendants by their attorney, and for answer to the complaint in the above entitled cause show to the court the following:

1. These defendants admit the allegations of the first numbered subdivision of said complaint, but in addition thereto aver that the patent issued by the United States on the 5th day of April, 1871, for the tract of land commonly called the Town of Tome Grant, was issued to the Town of Tome, as appears by reference to the copy of said patent attached to *to* said complaint.

2. These defendants deny that the plaintiffs are the owners in fee simple and in common or in any other manner, of an un-
24 divided one-half share, part and interest, or any other share, part or interest, in said grant and tract of land.

3. These defendants deny, upon information and belief, that Juan Barela and the other persons mentioned in the third subdivision of said complaint, ever had or owned an undivided part, share or interest, in common and in fee simple, in said grant and premises, but it admits that they were all severally interested in said grant and tract of land, as set forth in the answer of the Town of Tome, heretofore filed in this cause, and defendants admit that some of the heirs, assigns and legal representatives of said persons now claim some undivided interest in said grant.

And these defendants, by way of new matter, and as a defense to action of plaintiffs, and as a showing why plaintiffs are not entitled to the relief prayed in their complaint, show to the court the following:

a. These defendants adopt the affirmative allegations set out in the answer of the Town of Tome above referred to, and make the same a part of this answer, the same as though they were here repeated in full.

b. These defendants allege that they are owners in severalty of portions of the tract of land mentioned and referred to in said complaint and that said lands are their individual, separate property and in no way subject to any claim by plaintiffs and cannot be subject to partition as prayed in said complaint.

c. These defendants further allege that nearly all of the said

grant of land which is not held in severalty consists of land used for pasture in common by all the persons beneficially interested in said grant, under the general management and control of the board of trustees of said Town of Tome, in which town the complete title to said land is vested, as these defendants are advised, and that any partition of said pasture land would be impracticable, and a sale thereof as prayed in said complaint would be destructive of the value of said pasture lands to the whole community of the Town of Tome.

Wherefore, these defendants pray that the said complaint be dismissed at the cost of plaintiffs.

DOROTEO CHAVES,
One of said Defendants.

FRANK W. CLANCY,
Attorney for Defendants.

TERRITORY OF NEW MEXICO,
County of Valencia:

On the first day of October, 1910, before me, a notary public in and for the aforesaid county, personally appeared Doroteo Chaves, who, being duly sworn, on his oath says that he has read over the foregoing answer signed by him, and knows the contents thereof, and that the same is true excepting as to matters therein stated on information and belief, and as to those matters he believes it to be true.

Witness my hand and notarial seal the day and year last above written.

[SEAL.]

F. SCHOLLE,
Notary Public.

My commission expires 2nd day of September, 1911.

(Endorse- on back:) No. 1709. District Court, Santa Fe County. George W. Bond et al. vs. The Town of Tome et al. Answer of Doroteo Chaves and 391 others. Filed in my office this 11 day of Oct., 1910. W. D. Newcomb, Clerk.

26 In the District Court in and for the County of Valencia, Territory of New Mexico.

No. 1709.

GEORGE W. BOND et al., Plaintiffs,
vs.
TOWN OF TOME et al., Defendants.

Demurrer.

Now come the plaintiffs, by their attorneys, Hanna & Wilson, Esqrs., and demur to the answers of the Town of Tome, et al., and for ground of demurrer allege:

1st. That the said answers do not set forth facts sufficient to constitute a valid defense to complaint of plaintiffs herein, in that the allegation of the incorporation of the said Town of Tome is not sufficient, in point of law to bar the partition of the said grant as prayed for in said complaint; further that the allegation that the said grant is a town grant and therefore not subject to partition, is not sufficient, in point of law, to bar the right of plaintiffs to have a partition of said grant.

HANNA & WILSON,
Attorneys for Plaintiffs.

Office and Post-office address, Santa Fe, N. M.

(Endorsed on back:) No. 1709. In the District Court of the Seventh Judicial District, Territory of New Mexico, County of Valencia. George W. Bond et al. vs. Town of Tome. Demurrer. Filed in my office this 17th day of November, 1910. W. D. Newcomb, Clerk. Hanna & Wilson, Santa Fe, New Mexico, Attorneys for Plaintiffs.

27 In the District Court in and for the County of Valencia, Territory of New Mexico.

No. 1709.

GEORGE W. BOND et al., Plaintiff-,
vs.
UNKNOWN HEIRS OF JUAN BARELA et al., Defendants.

Stipulation.

It is hereby stipulated by and between the parties hereto, by their respective Attorneys, that the Demurrer to Defendants' answer shall be considered in connection with the translation of various grant papers and documents now in the office of the Surveyor General of New Mexico, in Santa Fe, which said documents for the purpose of the argument on the Demurrer shall be considered and taken as a portion of the record of this case as though made a part of the answer to which demurrer is filed, said documents being as follows:

Application for Grant by the original petitioners addressed to the Governor and Captain General of New Mexico in the year 1739.

The Grant by the Governor and Captain General Don Gaspar Domingo Mendoza.

The Judicial Act of Possession.

The Petition to the Surveyor General for Confirmation.

The report of the Surveyor General.

R. H. HANNA,
Attorney for Plaintiffs.

FRANK W. CLANCY,
Attorney for Defendants.

28 (Endorsed on back:) No. 1709. In the District Court of the Seventh Judicial District, Territory of New Mexico, County of Valencia. George W. Bond et al. vs. Unknown Heirs of Juan Barela et al. Stipulation. Filed in my office this 9 day of Dec., 1910. W. D. Newcomb, Clerk. Hanna & Wilson, Santa Fe, New Mexico, Attorneys for Plaintiffs.

In the District Court of the Seventh Judicial District of the Territory of New Mexico within and for the County of Valencia.

No. 1709.

GEORGE W. BOND et al., Plaintiffs,
vs.
THE UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Defendants.

Order Overruling Plaintiffs' Demurrer.

This cause coming on to be heard upon the motion of plaintiffs, for judgment upon their demurrer filed herein, to the answer of the defendants, and the Court being fully advised in the premises, after having heard arguments of counsel, doth overrule said demurrer, to which ruling the plaintiffs duly except.

Done in Chambers, at Socorro, New Mexico, this 14th day of December, A. D. 1910.

MERRITT C. MECHEM,
Judge of the Above-entitled Court.

29 (Endorsed on back:) No. 1709. Valencia Co. Order overruling plaintiffs' demurrer. Filed in my office this 14th day of Dec. 1910. W. D. Newcomb, Clerk. "E" 51-52.

In the District Court for the Seventh Judicial District in and for the County of Valencia, Territory of New Mexico.

GEORGE W. BOND et al., Plaintiffs,
vs.
UNKNOWN HEIRS OF JUAN BARELA et al., Defendants.

Partition.

Reply.

Come now the Plaintiffs in the above entitled cause and for reply to the new matter set up in the Answer of the Defendants herein, allege,—

A. They admit that in the year 1739, the persons named in Subdivision Three of the Complaint in this cause, petitioned the then Governor and Captain General of New Mexico for the grant of land called, "Tome Dominguez" and that said grant was made by said Governor and Captain General to said Petitioners, as alleged in the

Answer of the Defendant, the Town of Tome, and that upon the 30th day of July, 1739, the Senior Justice and War Captain of the Villa of San Felipe de Albuquerque duly delivered possession thereof to said Petitioners, but Plaintiffs deny that said possession so delivered vested in each of the Petitioners, title in severalty to said grant, except as hereinafter stated, and allege the fact to be that a
30 small portion of land sufficient to plant "one fanega of corn, two of wheat, garden and house-let" was given in severalty to each of the Petitioners as set out in the act of possession, (a true translation of which, taken from the records of the Surveyor General's Office, is hereto attached and made a part of this Reply, as "Exhibit A") and the balance of said grant was given to all the Petitioners in common, "their children, heirs and successors, to hold their lands now and forever at their will, the said Senior Justice and War Captain pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be used without any dispute, with the condition that each one is to use the same without dispute in equal proportion, the richest as well as the poorest."

B. Plaintiffs admit that in the year 1856, a petition by certain claimants of the grant of Sitio of Tome Dominguez, was filed in the office of the Surveyor General of New Mexico, for the confirmation of said grant under the Act of Congress of July 2, 1854, entitled, "An Act to establish the offices of Surveyor General of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes," and admit that on September 22nd, 1856, the Surveyor General of New Mexico made his decision approving said grant to the Town of Tome, but deny that said petitioners were inhabitants of the Town of Tome, and allege the fact to be that said petitioners claimed to be inhabitants of the Sitio of Tome Dominguez, which said Sitio of Tome Dominguez, plaintiffs allege was not limited to the alleged Town of Tome, but was co-extensive with the exterior boundaries of said grant, the said petitioners claiming, as residents of the Sitio of Tome Dominguez, to "have inherited the same from the original grantees or acquired the same by purchase," and alleging that "the Town of Tome is situated on said
31 grant, and the residences and farms of your petitioners," as shown by the copies of said petition and decision attached to the answer of defendant, the Town of Tome.

C. Plaintiffs admit the facts pleaded in Section "C" of answer of said defendant, the Town of Tome.

D. Plaintiffs have no knowledge or information sufficient to form a belief as to whether or not, under the Spanish and Mexican Governments, the Town of Tome was a regularly organized and existing municipality, with a town council and the officers provided and required by the Spanish and Mexican laws, and therefore deny the allegations contained in Section "B" of the Answer of Defendant, the Town of Tome, and require strict proof of the same.

E. With reference to the alleged incorporation of the Town of Tome, as set forth in Paragraph "E" of the Answer of the Defendant, the Town of Tome, Plaintiffs deny that the pretended corpora-

tion was ever incorporated according to law, or has ever existed as a lawfully constituted incorporated body, either under the law quoted in the Answer of Defendant, or any other law, and allege the fact to be that the pretended corporation was unlawfully and illegally constituted, and has, since the date of its pretended incorporation, never had a legal organization and has not been operated in accordance with the law and that all its acts, as such pretended corporation, have been illegal, void and without binding effect upon the Plaintiffs herein and other claimants of the Tome Grant, and that the alleged Trustees of said pretended corporation have illegally, unlawfully and without lawful authority sold certain choice tracts of said grant to individuals, and to certain of themselves, and have never accounted, in any manner whatsoever, for the proceeds of such illegal, unlawful and unauthorized sales, whereby the rights of the Plaintiffs
32 herein and such others as are similarly situated have been, and are being dissipated and wrested from them, without due process of law.

F. Plaintiffs have no information upon which to found a belief as to whether or not there are about four hundred or more persons holding land in severalty and private ownership within the limits of said grant and tract of land, and therefore deny the same and require strict proof of the extent of the holdings of such persons; but Plaintiffs admit that if such can be proven to be lawfully held by the alleged owners in severalty by adverse possession for the period required by the statute, such pieces and parcels of land so proven to be held in severalty are not subject to partition.

G. Plaintiffs deny that both the legal and equitable title in said grant, or in any part thereof, has vested in the pretended corporate body, the Town of Tome, as alleged in paragraph "G" of defendants' answer, in the year 1892, or at any time prior or subsequent to said year, and that no title has, at any time whatsoever, been acquired by said defendant as such pretended corporate body by adverse possession or otherwise, and allege the fact to be that the heirs, successors and assigns of the original grantees of said grant are the sole owners in common of the common lands of the said grant, by reason of the fact that the title of the said grantees was complete and perfect under and by virtue of the laws of the Kingdom of Spain, and that the Town of Tome has no right, title or interest in said lands which a court of equity can recognize, except that of trustee for the heirs, successors and assigns of the original grantees under and by virtue of the patent issued to the Town of Tome by the United States of America for said grant.

Plaintiffs further deny each and every portion of new matter in the answer of defendants in this cause not hereinbefore spe-
33 cifically answered, controverted or denied.

Wherefore, plaintiffs pray for the relief asked for in the complaint herein and for the appointment of a referee to take the testimony herein and to report the same with all due diligence to this honorable court.

HANNA & WILSON,
Attorneys for Plaintiffs.

Office and Postoffice address, Santa Fe, N. M.

TERRITORY OF NEW MEXICO,
County of Santa Fe, ss:

F. C. Wilson, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the plaintiffs in the above cause; that he has read over and understands the contents of the above reply, and that the same are true of his own knowledge, except as to such matters as are stated upon information and belief and as to those he believes them to be true, and that he makes this affidavit in the absence of plaintiffs herein.

F. C. WILSON.

Subscribed and sworn to before me this 11th day of January, A. D. 1911.

[SEAL.] EDITH C. MARMON,
Notary Public, Santa Fe County, N. M.

My commission expires July 30, 1914.

EXHIBIT "A."

Possession.—In the new settlement of "Nuestra Señora de la Concepcion de Thomi Dominguez," instituted and established by Don Gaspar Domingo de Mendoza, actual governor and captain general of this kingdom of New Mexico, on the thirtieth day of the month of July, in the year one -housand seven hundred and thirty-nine. I Captain Juan Gonzales Baz, senior justice and war captain of the town of San Folipe de Albuquerque, and the districts within its jurisdiction, by virtue of the decree issued and above provided
34 by said governor, the royal possession ordered to be given being published and promulgated, and the parties concerned being together, I proceed to the above-mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned, of "Nuestra Señora de la Concepcion de Thomi Dominguez," whose titular feast they promised to observe and celebrate every year. And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition, which are as follows: on the west the Del Norte river, on the south the place commonly called, "Los Tres Alamos," on the east the main ridge called Sandia, and on the north the point of the marsh at the hill called Tome Dominguez; at which principal boundaries I ordered them to perpetuate their existence with permanent landmarks, pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute, in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pro-

nounced this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances; and for their greater quietude, peace, tranquil-ity and harmony, I proceeded to point out the land each family should cultivate, each one receiveing in length a sufficient quantity to plant one fanega of corn,
35 two of wheat, garden and house lot, as follows: To Francisco Sanchez, the general boundary on the west, the Del Norte river and (torn) arroyo or dry branch running out from said river, (torn) bounded by lands of Matias Romero, (torn); with them the lands of Ygnacio Baco; with them Lugardo Ballejc; with these the lands of (torn) these are bounded by the lands of Bernardo Bellejo; (torn) lands of Juan Ballejo el grande; with these (torn) Gregorio Jaramillo; with these are bounded the lands of Josefa Gutierrez; with these a body of the lands of her brother Gregorio Gutierrez, (torn) the lands bounded by them; those of Miguel Lucero, (torn;) with them those of Francisco de Silva; with these are those of Juan Ballejo the youngest; with these are bounded the lands of Manuel Carrillo and his sister Jacinta Martin Carrillo, (torn) a body of the lands of Juan Barela, (torn) Ventura Romero, Domingo Sedillo, (torn) Salvador Manuel Marquez, Manuel Carrillo, (torn) Jacinto Barela and Augustin Gallego, (torn) on the east, (torn) Cristobal Gallegos, Felipe Barela, (torn) Simon Zamora and Juan Montaño, (torn) which are distributed on uncultivated ground in order that (torn) appear to be agreed upon (torn) possession was given, (torn) all having expressed themselves satisfied now and in the future, without failing to comply in one single instance with what had been ordered, nor in which said settlers should observe. And in order that it may so appear, I signed, acting by appointment, with attending witnesses, in the absence of a public and royal notary, there being none in this kingdom, on said day up supra, etc., corrected.

FRANCISCO SANHEZ.
JUAN GONZALES BAZ.

Witnesses:

ALEJANDRO GONZLES,
ISIDRO SANCHEZ.

36 (Endorsed on back.) No. 1709. In the District Court of the First Judicial District. Territory of New Mexico, County of Valencia. George W. Bond, et al., vs. Unknown Heirs of Juan Barela, et al. Reply. Filed in my office this 22 day of Jan. 1911. W. D. Newcomb, Clerk. By W. Homer Hill, Deputy. Hanna & Wilson, Santa Fe New Mexico, Attorneys for Plaintiff.

In the District Court in and for the County of Valencia, Territory of New Mexico.

No. 1709.

GEORGE W. BOND et al., Plaintiffs,
vs.
THE TOWN OF TOME et al., Defendants.

Reply.

Now comes the plaintiffs herein and for reply to the new matter set up in the answer of Doroteo Chaves and 391 others, allege:

A. Plaintiffs adopt the same denials and defenses heretofore made by them to the answer of the Town of Tome, and apply the same to the answer of the defendants contained in paragraph "A" of their answer, the same as though they were repeated in full.

B. Plaintiffs allege that they have no information upon which to base a belief as to whether or not the defendants are the owners, in severalty, of any portion or portions of the tract of land de-
37 scribed in the complaint, and therefore deny the same and require strict proof of the extent of the holdings of said defendants.

C. Plaintiffs admit that there is a large portion of said grant used by all persons beneficially interested in said grant for pasture in common, but deny that there is any title in the Town of Tome which can serve as a bar to these plaintiffs for the relief prayed for in their complaint.

Wherefore, plaintiffs renew prayer contained in their said com-plaint.

HANNA & WILSON,
Attorneys for Plaintiffs.

Office and Post Office *Ad*-Address, Santa Fe, New *New* Mexico.

TERRITORY OF NEW MEXICO,
County of Santa Fe:

F. C. Wilson, being first duly sworn, upon his oath, deposes and says: That he is one of the Attorneys for the Plaintiffs herein; that he makes this verification for and on their behalf; that he has read over and knows the contents of the above Reply and that the same are true, except as to such matters as are stated upon information and belief, and as to those matters, he believes them to be true.

F. C. WILSON.

Subscribed and sworn to before me this 17*to* day of February, 1911.

[SEAL.] EDITH C. MARNON,
Notary Public, Santa Fe County.

My commission expires July 30th, 1914.

38 (Endorsed on back:) No. 1709. In the District Court of the Seventh Judicial District. Territory of New Mexico, County of Valencia. George W. Bond et al. vs. The Town of Tome et als. Reply. Filed in my office this 20th day of Feb. 1911. W. D. Newcomb, Clerk. Hanna & Wilson, Santa Fe, New Mexico, Attorneys for Plaintiffs.

GEORGE W. BOND et al.
vs.
TOWN OF TOME et al.

Now come the defendants, the Town of Tome, and Doroteo Chaves and 391 others, and say that the reply of the said plaintiffs to the answers of said defendants and the matters therein contained as the same are therein pleaded and set forth, are not sufficient in law for plaintiffs to have or maintain their action against said defendants, and they show to the court here the following causes of demurrer in law to the said reply:

1. The said reply does not set up facts sufficient to constitute or support any cause of action.

2. The subdivision of said reply marked "A" tenders no issue of fact as it substantially admits all of the allegations of the paragraph of the answers of defendants to which it is responsive.

3. Subdivision "A" of said reply sets up a denial "that said possession so delivered vested in each of the petitioners title in severalty to said grant," while the answers contain no allegation anything like the reply purports to deny.

39 4. Said subdivision "A" of said reply attempts to substitute as evidence of the right and title of the grantee to whom the grant was made in 1729, the act of juridical possession for the grant itself, just as plaintiff's counsel attempted to do upon the argument on the demurrer to the answers.

5. Subdivision "B" of said reply tenders no issue of fact as it substantially admits all of the allegations of the paragraph of the answers to which it is responsive.

6. Subdivision "B" of said reply denies that the petitioners to the Surveyor General were inhabitants of the Town of Tome, when the fact is that the answers do not allege that they were inhabitants of the Town of Tome, and it is immaterial and unimportant whether they were or not.

7. Said sub-division "B," alleges affirmatively that said petitioners claim to be inhabitants of the sitio of Tome Dominguez, which is immaterial and unimportant and not responsive to anything in said answers contained, which is set out in full — the said petition, which must speak for itself.

8. Said subdivision "B" sets out an allegation that the sitio of Tome Dominguez was not limited to the Town of Tome, but extended to the exterior boundaries of the grant and also sets out what the petitioners claimed, all of which is immaterial and unimportant and purports to be based only upon the petition to the surveyor-general and his decision, which are parts of the said answers.

9. Sub-division "D" of the said reply purports to tender an issue of fact as to the existence of the Town of Tome under the former governments, when as a matter of law, the courts take judicial notice of the existence or non-existence of such municipalities, so that the trial of such matters by proofs would not be proper.

40 10. Sub-division "E" of said reply, while denying that the defendant, the Town of Tome, was incorporated according to law, does not set up any fact whatever upon which such denial is based, while the answers base the assertion of such incorporation upon the files and records of this court in the case numbered 1166 on the civil docket, thus making all the proceedings in said case for said incorporation a part of the answer, and the said reply does not point out any defect whatever in said proceedings or any fact to show that the acts of said corporation are illegal or without binding effect upon plaintiffs.

11. Said Sub-division "E" of said reply alleges acts of misconduct on the part of the trustees of the Town of Tome, which, even if such allegations were true, would be no ground to support the action of plaintiffs nor in any way relevant to any proper issue which can be raised in this cause.

12. Sub-division "G" of said reply does not even purport to deny the material allegation of that portion to the answers to which it appears to respond, which allegation is that the defendant, the Town of Tome, has held and claimed all of the lands in said grant, not held in severalty, ever since the year 1892, and that no claim by suit in law or equity effectually prosecuted, has been set up or made to said lands within said time, but that it has been in the open, notorious, exclusive possession of all said lands, adverse and hostile to the whole world.

13. Subdivision "E" of said reply admits substantially all that is claimed in the paragraph of the answers to which it is responsive, which is in substance that lands held and owned in severalty within the grant cannot be in any way subject to claim by plaintiffs, or to any partition as prayed in the complaint, and the number of such owners as the nature of their titles cannot be any proper sub-

41 ject for the taking of proof until the right of plaintiffs to any partition at all is first established.

14. Said Sub-division "G" of said reply alleges that the heirs, successors and assigns of the original grantees are the sole owners in common of the common lands of the grant, and goes on to set up as a reason therefore that the title of the grantees was complete and perfect under the laws of Spain, all of which is a pure conclusion of law, and cannot raise any question of fact before trial in this cause, and is on its face manifestly an incorrect statement of law.

Wherefore, defendants pray judgment of the said reply as to whether the same is sufficient in law and that the said complaint may be dismissed at the cost of plaintiffs as they have already heretofore prayed in their said answers.

FRANK W. CLANCY,
Attorney for Said Defendants.

(Endorsed on back:) 1709. District Court, Valencia County. Bond et al. vs. Town of Tome et al. Demurrer to Reply. Filed in my office this 16th day of January, 1911. W. D. Newcomb, Clerk. By W. Homer Hill, Deputy.

No. 1709.

GEORGE W. BOND et al.
vs.
TOWN OF TOME et al.

This cause coming on to be heard upon the demurrer of such defendants as have appeared in this cause, to the reply of plaintiffs to the answers of those defendants, after hearing arguments of
42 counsel as well for plaintiffs as for said defendants, Messrs. Hanna & Wilson appearing for plaintiffs and Frank W. Clancy for said defendants, the court, being sufficiently advised in the premises, sustains said demurrer. It is therefore ordered, adjudged and decreed by the court that said demurrer be and the same hereby is sustained, and that said reply, and the matters therein set forth, are not sufficient in law for plaintiffs to have or maintain their action against said defendants; and it is further ordered that plaintiffs have leave to plead further to said answers as they may be advised within twenty (20) days from this third day of February, 1911.

MERRITT C. MECHEM,
Associate Justice, etc.

(Endorsed on back:) 1709, Valencia. Filed in my office this 3rd day of February, 1911. W. D. Newcomb, Clerk. By W. Homer Hill, Deputy.

No. 1709.

GEORGE W. BOND et al.
vs.
TOWN OF TOME et al.

Now come the said plaintiffs by their attorneys, Messrs. Hanna & Wilson, and say to the court here that they decline to plead further to said answers of the defendants who have appeared in this cause and elect to stand upon their reply heretofore filed herein; and thereupon the court finds that the complaint herein should be dismissed: It is therefore ordered, adjudged and decreed by the court that the said complaint be and the same hereby is dismissed, and that the said defendants go hence without day; and thereupon the said plaintiffs, by their said attorneys, pray the court for an appeal
43 from the proceedings and judgment of the court in this cause to the Supreme Court of the Territory of New Mexico, which is granted by the court; It is therefore ordered by the court that the said plaintiffs be and they hereby are granted an appeal from the

proceedings and judgment of this court in this cause to the Supreme Court of the Territory of New Mexico.

MERRITT C. MECHEM,
Associate Justice.

(Endorsed on back:) 1709 Valencia. Filed in my office this 4th day of February, 1911. W. D. Newcomb, Clerk. By W. Homer Hill, Deputy.

In the District Court of the Seventh Judicial District of New Mexico for the County of Valencia, New Mexico.

No. 1709.

GEORGE W. BOND et at., Plaintiffs,
vs.
THE UNKNOWN HEIRS OF JUAN BARELA et al., Defendants.

Appeal Bond.

Know all men by these presents: That we, Frank Bond of Española, Rio Arriba County, New Mexico, as principal, and Leandro Martinez and Louis F. Nohl, as sureties, are held and bound upon the Town of Tome and Doroteo Chaves and 391 others, named as defendants in the above entitled cause, for the payment of any and all costs for which the said Frank Bond, George W. Bond and the other plaintiffs in the said above entitled cause shall become liable, and which may be adjudged against them upon the appeal from the judgment and proceedings of the district court of Valencia County of the Territory of New Mexico to the supreme court of said Territory.

44 In witness whereof, we have hereunto set our hands and affixed our seals this 20th day of February, 1911.

FRANK BOND, *Principal.* [SEAL.]
LEANDRO MARTINEZ, [SEAL.]
LOUIS F. NOHL, [SEAL.]
Sureties.

STATE OF COLORADO,
County of Pueblo, ss:

I, James A. Park, a notary public in and for said county, in the state aforesaid, do hereby certify that Frank Bond, who is personally known to me to be the person whose name is subscribed to the foregoing appeal bond, appeared before me this day in person — acknowledged that he signed, sealed and delivered the said instrument in writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and Notarial Seal this 20th day of February, A. D., 1911.

My commission expires November 13, 1913.

JAMES A. PARK,
[SEAL.] *Notary Public, Pueblo County, Colorado.*

TERRITORY OF NEW MEXICO,
County of Rio Arriba, ss:

Before me the undersigned Notary Public, in and for said county, personally appeared Leandro Martinez and Louis F. Nohl known to me to be the same persons mentioned in and who executed the foregoing instrument, as sureties, and acknowledged, each for himself, that they executed the same as their free act and deed; and the said sureties, being duly sworn, did also say, each for himself, that they are respectively and severally worth the sum of One Thousand ($1,000.00) Dollars over and above all their just debts and liabilities, and the amount by law exempt from execution.

45 In witness whereof, I have hereunto set my hand and affixed my official seal this 22nd day of February, A. D., 1911.

[SEAL.] J. A. LUCERO,
Notary Public, Rio Arriba County, New Mexico.

My commission expires April 15, 1914.

Approved as to form and sufficiency, February 24th, 1911.

W. D. NEWCOMB, *Clerk.*

(Endorsed on back:) No. 1709. In the District Court of the Seventh Judicial District, Territory of New Mexico, County of Valencia. George W. Bond, et al., vs. Town of Tome, et al. Appeal Bond. Filed in my office this 24th day of February, 1911. W. D. Newcomb, Clerk. By W. Homer Hill, Deputy. Hanna & Wilson, Santa Fe, New Mexico, Attorneys for Plaintiffs.

TERRITORY OF NEW MEXICO,
Seventh Judicial District Court, County of Socorro, ss:

I, W. D. Newcomb, Clerk of the Seventh Judicial District Court, within and for the County of Valencia, Territory of New Mexico, do hereby certify that the above and foregoing is a true and correct copy of the Complaint, Answer of Town of Tome, Answer of Doroteo Chaves, et al., Demurrer to the Answer of Town of Tome, Stipulation and Exhibits made a part of the record thereby, Order overruling Demurrer, Reply to Answer of Town of Tome,
46 Reply to Answer of other Defendants, Demurrer to Reply, Order sustaining Demurrer, Final Judgment and Order granting Appeal, and Plaintiffs' Bond on Appeal in a cause lately pending wherein George W. Bond, et al., were plaintiffs and the Unknown Heirs of Juan Barela, et al., were defendants, and that the same remains of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 24th day of February, A. D. 1911, at my office in the City of Socorro, County of Socorro, New Mexico.

[SEAL.] W. D. NEWCOMB, *Clerk.*

47 And afterwards, on to-wit, at a regular term of the Supreme Court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1911, on the twenty-eighth day of said regular term, the same being Wednesday August 23, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Appeal from District Court, Valencia County.

It is ordered by the Court that this cause be, and the same hereby is set for hearing Friday August 25, A. D. 1911.

And afterwards, on to-wit, *on* the thirtieth day of the said regular term, the same being Friday August 25, A. D. 1911, the following amongst other proceedings were had and entered of record as follows, to-wit:

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Appeal from District Court, Valencia County.

This cause coming on for hearing upon the transcript of record, assignment of errors and briefs of counsel, is argued by Francis C. Wilson, Esq., for appellants, and F. W. Clancy, Esq., for Appellees, and submitted to the Court, and the Court not being
48 sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to-wit, on the forty-fifth day of the said regular term, the same being Tuesday December 19, A. D. 1911, the following amongst other proceedings were had and entered of record as follows, to-wit:

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Appeal from District Court, Valencia County.

This case having been argued by counsel, submitted to the Court and taken under advisement by the Court upon a former

day of the present term, and the Court being now sufficiently advised in the premises announces its decision by Chief Justice Pope, Associate Justices McFie, Parker, Wright and Roberts concurring, affirming the judgment of the Court below for the reasons stated in the opinion of the Court on file;

It is therefore considered and adjudged by the Court that the judgment of the District Court in and for the County of Valencia whence this cause came into this court be, and the same hereby is affirmed, and that in accordance therewith;

It is considered and adjudged by the Court that the complaint herein be, and the same hereby is dismissed and that the said defendants go hence that day;

It is further adjudged and decreed by the Court that the appellees do have and recover from the appellant their costs in this behalf expended to be taxed, for which let execution issue.

49 And afterwards, on to-wit, on the 22nd day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a motion for an appeal, which said motion for an appeal was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1384.

GEORGE W. BOND et al., Appellants,

vs.

UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Motion for an Appeal.

The above named Appellants respectfully show that the above entitled cause is now pending in the Supreme Court of the Territory of New Mexico, and that a judgment has therein been rendered on the 19th day of December, 1911, affirming the Decree of the Territorial District Court in and for the County of Valencia, Territory of New Mexico, and that the matter of controversy in said suit exceeds five Thousand ($5,000.00) Dollars besides costs, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, said Appellants pray that an appeal be allowed to them in the above entitled cause, directing the Clerk of the Supreme Court of the Territory of New Mexico to send the record and proceedings of said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the
50 errors complained of in the Assignment of Errors herewith filed by the said Appellants may be reviewed and, if error

be found, corrected, according to the laws and customs of the United States.

(Signed) HANNA & WILSON,
Attorneys for Appellants.

Office & Post Office Address, Santa Fe, New Mexico.

Dated at Santa Fe, New Mexico, this 21st day of December, 1911.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be, and is hereby, allowed as prayed.

WM. H. POPE,
Chief Justice of the Supreme Court of the Territory of New Mexico.

Dated Santa Fe, New Mexico, December —, 1911.

And afterwards, on to-wit, on the 22nd day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a stipulation as to value of property involved in this cause, which stipulation was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
51 UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Stipulation as to Value of Property Involved in this Cause.

It is hereby stipulated by and between the parties hereto, by their respective Attorneys, Messrs. Hanna & Wilson and Hon. Frank W. Clancy, that the value of the property involved in this cause amounts to more than Five Thousand ($5000.00) Dollars, exclusive of the costs in the case.

(Signed) HANNA & WILSON,
Attorneys for Appellants.
FRANK W. CLANCY,
Attorneys for Appellees.

And afterwards, on to-wit, on the 22nd day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an assignment of errors on appeal to the Supreme Court of the United States, which said assignment of errors was, and is in the following words and figures, to-wit:

In the Supreme Court of the Territory of New Mexico.

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

52 *Assignment of Errors.*

The Appellants in the above entitled cause, in connection with their Petition for Appeal herein, present and file therewith their assignment of errors, as to which matter and things they say that the Decree entered herein on the 19th day of December, 1911, is erroneous, to-wit:

That the Court erred in sustaining the lower court;

a. In holding and deciding that the grant made to Juan Barela and his companions in the year 1739 by the Captain General and Governor of New Mexico, Caspar Domingo de Mendoza, was not a grant to the entire tract petitioned for, but only to the allotments in severalty.

b. In holding and deciding that said grant to the petitioners was made with a reservation of title in the Crown to the common lands of the grant.

c. In holding and deciding that the Acts of Congress of December 22nd, 1858, confirming to the Town of Tome said grant, operated as a grant de novo to said Town and vested in it a complete legal and equitable title to the grant.

d. In holding and deciding that said grant was not complete and perfect in the heirs, successors, and assigns, as tenants in common, at the time of the Treaty of Guadalupe Hidalgo.

e. In holding and deciding that the Congress of the United States, by said Act, did not confirm a complete and perfect title and that said Act of Confirmation to the Town of Tome did not inure to the benefit of the heirs, successors and assigns of the original grantees.

53 *f.* In holding and deciding that the expedients of title, the petition of the heirs, successors and assigns of the original grantees, to the Surveyor General of New Mexico, dated August 6th, 1856, and the findings of the Surveyor General dated September 2nd, 1856, do not constitute a chain of evidence sufficient to support a valid and subsisting title by prescription against the Spanish and Mexican Governments, prior to the Treaty of Guadalupe Hidalgo, to the entire tract by the heirs, successors and assigns of the original grantees, as tenants in common.

g. In holding and deciding that the incorporation in the year 1892 of this grant, under the provisions of an Act of the Legislative Assembly of the Territory of New Mexico, entitled,—"An Act Relating to Community Land Grants and for other purposes," which became a law February 26th, 1891, vested in said alleged

corporation such a legal and equitable title to this grant as would, at any time thereafter, bar the tenants in common from their right to partition the common lands of the grant.

Wherefore, The Appellants pray that said Decree may be reversed and that the Appellants may have an adjudication and decree in their favor, as herein specified.

(Signed) HANNA & WILSON,
Attorneys for Appellants.

Office & Post Office Address, Santa Fe, New Mexico.

54 And Afterwards, on to-wit, on the forty-seventh day of the said regular term, the same being Friday December 22, A. D. 1911, the following amongst other proceedings were had and entered of record, to-wit:

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Appeal from District Court, Valencia County.

This cause coming on before the Court upon the motion of appellants herein to be granted an appeal from the judgment and decree of this Court to the Supreme Court of the United States, and the Court being sufficiently advised in the premises, grants the same.

It is therefore considered and adjudged by the Court that the appellants do have, and hereby *is* granted the appeal to the Supreme Court of the United States from the judgment and decree of this Court.

And Heretofore, on to-wit, on the 19th day of December, A. D. 1911, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, an opinion by the Court in the above entitled cause, which said opinion by the Court was, and is in the following words and figures, to-wit:

55 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1911.

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Appeal from District Court, Valencia County.

Syllabus.

(By the Court.)

The title papers of the town of Tome grant examined and held to be a community grant of the nature described in United States vs. Sandoval, 167 U. S. 278, Rio Arriba Company v. United States, 167 U. S. 298 and United States v. Penna, 175 U. S. 500.

Opinion of the Court.

POPE, *C. J.*:

The appellants, Bond and others, filed suit for partition and quiting of title against the unknown heirs of a large number of persons and the unknown owners and proprietors and claimants of interest in what is known as the Tome grant in Valencia county, New Mexico. The persons whose unknown heirs were sued were the persons alleged to have been the grantees of that grant being the person named in the grant papers to be presently more fully noticed. The case was decided upon the pleadings. The controlling question is whether the grant papers made in 1739 constituted a grant to the parties named therein for the entire tract or whether they constituted simply a grant to such parties of the allotments described therein as set aside to them leaving the unallotted lands for future settlers and the outlying pasture and non-agricultural lands in the crown. It is contended by the plaintiffs and appellants that if the former is true then plaintiffs who apparently held by succession of title from some of the original grantees are entitled to have partition as against others similarly holding interests. It
56 is contended on behalf of the defendants, among them being the corporation known as the Town of Tome, that the legal effect of the grant when made was, save as to the small pieces of land actually allotted, to pass no title from the crown of Spain and that when the United States succeeded to the sovereignty in 1848 the title to all save these allotments passed into the United States, and that when the United States by act of congress approved December 22, 1858, confirmed, he grant to the town of Tome and when patent issued to said town pursuant to said confirmation the title thus held previously by the government passed directly to the town unburdened with any trust on behalf of the heirs of the parties

named in the original title papers and thus with no claims upon it which plaintiffs may here assert. This involves a consideration of the nature of the original grant papers. These are as follows

"Year 1739. New settlement of 'Nuestra Senors de la Concepcion de Tome Dominguez,' instituted and established by Don Gaspar Domingo de Mendoza governor and captain general of this Kingdom of New Mexico contained in four pages, including this.

Sir Senior Justice: All the undersigned appear before you, and all and jointly, and each one for himself, state, and in order that his excellency the governor may be pleased to donate to them the land called Tome Dominguez, granted to those who first solicited the same and who declined settling thereon, we therefore ask that the land be granted to us; we therefore pray you to be pleased, (eaten by mice) at that time to (eaten by mice), said settlers we being disposed to settle upon the same within the time prescribed by law; we pray you to be pleased to give us the grant which you have caused to be returned, as you are aware that our petition is founded upon justice and necessity, our present condition being very limited, with scarcity of wood, pasture for our stock, and unable to extend our cultivation and raising of stock in this town of Albuquerque, on account of the many footpaths encroaching upon us, and not allowed to reap the benefit of what we raise, and, in a measure, not even our crops on account of the scarcity
57 of water, and with most of us our lands are of little extent and much confined, etc. In view of all which we pray and request you to be pleased to grant our petition, by doing which we will receive grace with justice: and we swear in all form that it is not done in malice; we protest costs and whatever may be necessary. Juan Barela, Joseh Salas, Juan Ballejos, Manuel Carrillo, Juan Montano, Domingo Sedillo, Matias Romero, Bernardo Ballejo, Gregorio Jaranmillo, Francisco Sanchez, Pedro Romero, Phelipe Barela, Lugardo Ballejos, Augustin Gallegos, Alonzo Perea, Thomas Samora, Nicholas Garcia, Ignacio Baca, Salvador Manuel, Francisco Silva, Francisco Rivera, Juan Antonio Zamora, Miguel Lucero, Joachim Sedillo, Simon Zamora, Xpritoval Gallegos, Juan Ballejos, grande, Jacinto Barela, Diego Gonzales.

In this town of San Phelipe de Albuquerque, on the Second day of the month of July, in the year one thousand and seven Hundred and thirty nine, before me, Captain Juan Gonzales Baz, Senior Justice of this town and its jurisdiction, came the persons contained in the above petition which by me seen, I state: That I cannot deliver to them the grant asked for, as it has been returned by order of my governor, until I consult with his excellency, to whom this petition is referred, that seeing it, his excellency may determine whatever may be proper. I have so ordered and signed, acting by appointment, with two attending witnesses, in the absence of a public or royal notary, there being none in this kingdom.

Date, ut supra,

JUAN GONZALES BAZ.

Witness:

B. S. R. ALEJANDRO GONZALES.

SALVADOR MARTINEZ.

"Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom of New Mexico, for his majesty, having seen the above, I consider it as presented, and in view of the individuals therein contained, grant to them in the name of his majesty, who may God preserve, the land petitioned for, called the land of Tome Dominguez, for themselves, their successors, and whoever may have a right thereto under the conditions and circumstances re-
58 quired in such cases, and which is to be without prohibition to any one desiring to settle the same, holding and improving it during the time required by law. In view of which, I should order, and did order, that said senior justice or his lieutenant, whose duty it is, shall place them in possession of the aforementioned lands, giving in all case to each one the portion he may be entitled to in order to avoid difficulties which may occur in the future. I have so provided, Ordered, and signed, acting by appointment, with attending witness, in the absence of a royal or public notary, there being none other.

DON GASPAR DOMINGO MENDOZA.

ANTONIO DE HERRERA.
JOSEH TERRUS.'

Possession.—In the new settlement of "nuestra Senora de la Conseppcion de Thomi Dominguez," instituted and established by Don Gaspar Mendoza, actual governor and captain general of this Kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty nine. I captain Juan Gonzales Baz, senior justice and war captain of the town of San Phelipe de Albuquerque, and the districts within its jurisdiction, by virtue of the decree issued and above provided by said Governor, the royal possession ordered to be given being published and promulgated, and the parties concerned being together, I proceed to the above-mentioned place, and all being present. I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned of "nuestra Senora de la Concepcion de Thomi Dominguez," whose titular feast they promised to observe and celebrate every year. And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition, which are as follows: On the west
59 the Del Norte river, on the south the place commonly called "Los Tres Alamos," on the east the main ridge called San Dia and on the north the point of the marsh at the hill called Tome Dominguez; at which principal boundaries I ordered them to perpetuate their existence with permanent land marks, pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce

this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances: and for their greater quietude, peace, tranquility and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows: To Francisco Sanchez, the general boundary on the west, the Del Norte river and (torn) arroyo or dray branch running out from said river, (torn) bounded by lands of Matias Romero, (torn) with them the lands of Sugardo Ballejo, with these the lands of (torn) these are bounded by Ygnacio Baca: with them the lands of Bernardo Balejo; (torn) lands of Juan Ballejo el grande; with these (torn) Gregorio Jaramillo; with these are bounded the lands of Josefa Gutierrez, with these a body of lands of her brother Gregorio Gutierrez, (torn) the lands bounded by them; those of Miguel Lucero, (torn) with them those of Francisco Silva; (with these are those of Juan Ballejo the youngest; with these are bounded the lands of Miguel Carrillo and his sister Jacinta Martin Carrillo, (torn) a body of lands of Juan Barela, (torn) Ventura Romero, Domingo Sedillo, (torn) Salvador Manuel Marguez, Manuel Carrillo (torn) Jacinto Barela and Augustin Gallegos (torn) on the east, (torn) Cristobal Gallegos, Felipe Barela, (torn) Simon Xamora and Juan Montaño, (torn) which are distributed on uncultivated ground in order that (torn) appeared to be agreed upon (torn) possession was given (torn) all having expressed themselves as satisfied now and in the future, without failing to comply in one single instance with what had been ordered, nor in which said settlers should observe. And in order that it may so appear, I signed, acting by appointment, with attending witnesses, in the absence of a public and royal notary, there being none in this kingdom, on said day ut supra, &c. corrected.

FRANCISCO SANCHEZ.
JUAN GONZALES BAZ.

Witnesses:
ALEJANDRO GONZALES,
YSIDRO SANCHEZ."

In determining the controlling question in the case the work of this court, as doubtless was the work of the court below, is greatly facilitated by the course of litigation involving certain grants before the court of private land claims, established by the Act of March 3, 1891, to deal with the Spanish and Mexican land grants in the Southwest. That court had before it four grants the decisions of which throw light upon the present case. The first of these grants was known as the San Miguel del Bado grant which was prosecuted before the court of Private Land Claims under the title of United States v. Sandoval. This case subsequently went to the Supreme Court of the United States and is reported under the title of the

United States v. Sandoval, 167 U. S., 278. The title papers in that case were as follows:

"I, Lorenzo Marquez, resident of this town of Santa Fe for myself and in the name of fifty-one men accompanying me, appear before your excellency, and state that in consideration of having a very large family, as well myself as these accompanying me, though we have some land in this town, it is not sufficient for our support, on account of its smallness and great scarcity of water, which owing to the great number of people, we cannot all enjoy, therefore we have entered a tract of land on the Rio Pecos, vacant and unsettled, at the place commonly called El Vado, and where there is room enough not only for us, the fifty-one who ask it, but also for everyone in the province not supplied. And its boundaries are, on the
61 north the Rio de la Vaca, from the place called the Rancheria to the Agua Caliente; on the south the Canon Blanco; on the east the Cuesta, with the little hills of Bernal, and on the west the place commonly called the Guzano, which tract we ask to be granted us in the name of our Sover-ign, who may God preserve; and among these fifty-one men petitioning are thirteen Indians, and among them all are twenty-five fire arms, and they are the same persons who appear in the subjoined list which I present in due form; and we unanimously and harmoniously, as one person, do promise to enclose ourselves in a plaza well fortified with bulwarks and towers, and to exert ourselves to supply all the fire-arms and ammunition that it may be possible for us to procure. And, as we trust in a compliance with our petition, we request and pray that your excellency be pleased to direct that we be placed in possession in the name of his royal Majesty our Sover-ign, whom may God preserve. And we declare in full legal form that we do not act with dissimulation, etc.

LORENZO MARQUEZ,
'For Himself and the Petitioners.'

(The list referred to does not appear.)

'Decree.

'At the town of Santa Fe, Capital of this Kingdom of New Mexico, on the 25th day of the month of November, one thousand seven hundred and ninety-four, I L-eutenant Colonel Fernando Chaco, Knight of the Order of Santiago, civil and military Governor of said Kingdom, subinspector of the regular troops therein, and inspector of the militia thereof, for His Majesty, (whom may God Preserve), having seen the foregoing document and petition of Lorenzo Marquez for himself and in the name of fifty-one men, should and did direct the principal Alcalde of this town, Antonio Jose Ortiz, to execute said grant as requested by the petitioners, so that they, their children and successors may have, hold and possess the same in the name of his Majesty, observing at the same time the conditions and requisites required in such cases to be observed, and especially that relative to not injuring third parties. Thus I ordered,

provided and signed with the witnesses in my attendance,
62 with whom I act for want of royal or public notary, of which there is none in said Kingdom, and upon this common paper, there being none of any seal, to which I certify.

'CHACON.'

'Attending:
'FERNANDO LAMELAS.'

'On the 26th day of the month of November, one thousand seven hundred and ninety-four, I, Antonio Jose Ortiz, captain of the militia and principal alcalde of the town of Santa Fe, in the pursuance of the order of Lieutenant Colonel Fernando Chacon, knight of the order of Santiago, and civil and military governor, of this Kingdom, before proceeding to the site of El Vado I, said principal alcalde, in company with two witnesses, who were Xavier Ortiz and Domingo Santistevan, the fifty-two petitioners being present, caused them to comprehend the petition they had made, and informed them that to receive the grant they would have to observe and fulfil in full form of law the following conditions:

'First. That the tract aforesaid has to be in common, not only in regard to ourselves, but also to all the settlers who may join them in the future.

'Second. That with respect to the dangers of the place, they shall have to keep themselves equipped with firearms and bows and arrows, in which they shall be inspected as well as at the time of settling as at any time the alcalde in office may deem proper, provided that after two years' settlement all the arms they have must be fire arms, under the penalty that all who do not comply with this requirement shall be sent out of the settlement.

'Third. That the plaza they may onstruct shall be according as expressed in their petition; in the meantime they shall reside in the Pueblo of Pecos where there are sufficient accommodations for the aforesaid fifty-two families.

'Fourth. That to the alcalde in office in said pueblo they shall set apart a small separate piece of these lands for him to cultivate for, himself at his will, without their children or the successors making any objection thereto, and the same for his successor in office.
63 'Fifth. That the construction of their plaza, as well as the opening of acequias and all other work that may be deemed proper for the common welfare, shall be performed by the community with that union which in their government they must preserve.

'And when this was heard and understood by each and all of the aforesaid persons, they accordingly unanimously responded that they understood and heeded what was communicated to them.

'Wherefore, I took them by the hand and announced in clear and intelligible words that in the name of His Majesty (God preserve him) and without prejudice to the royal interest or that of any third party, I led them over said lands, and they pulcked up grass, cast stones, and shouted 'long live the King,' taking possession of said land quietly and peaceably, without any objection, pointing out to them the boundaries, which are, on the north, the Rio de la

Vaca, from the place called the Rancheria to the Agua Caliente; on the south, the Canon Blanco; on the east, the Cuesta with the little hills of Bernal, and on the west, the place commonly called the Guzano, notifying them that the pastures and watering places are in common, And that in all *th*ime it may so appear, I, acting by appointment, for want of a notary, there being none in this jurisdiction, signed this with my attending witnesses, with whom I act. To which I certify.

'ANTONIO JOSE ORTIZ.'

'Attending:

'JOSE CAMPO REDONDO,
ANTONIO JOSE ORTIZ.

'This copy agrees with its original on file among the archives of this town, and is faithfully and legally made, compared and corrected. In testimony whereof, I make my customary sign Manuel in this town of Santa Fe on the eighth day of the month of November one thousand seven hundred and ninety-four.

'[SEAL.]
(Signed) "ANTONIO JOSE ORTIZ.'

Fourth Rial.

'Fourth seal, fourth real, year one thousand seven hundred and ninety-eight and ninety-nine.

'[SEAL]

64 'At this place, San Miguel del Bado del Rio de Pecos, jurisdiction of the capital town of Santa Fe, New Mexico, on the twelfth day of March in the present year, one thousand eight hundred and three, I, Pedro Baptista Pino, Justice of second vote of the town of Santa Fe and its jurisdiction, by verbal order of Colonel Fernando Chacon, governor of this province, have proceeded to this said settlement for the purpose of distributing the lands which are under cultivation to all the individuals who occupy said settlement; and having examined the aforesaid cultivated land, I measured the whole of it from north to south and then proceeded to lay off and provide the several portions, with the concurrance of all parties interested, until the matter was placed in order according to the means myself and the parties interested deemed the best adapted to the purpose, in order that all should be satisfied with their possessions, although said land is very much broken on account of the many bends in the river. And after the portions were equally divided in the best manner possible I caused them to draw lots, and each individual drew his portion, and the number of varas contained in each one portion was set down, as will appear from the accompanying list, which contains the number of the individuals who reside in this precinct, amounting to the number of fifty-eight*h* families, between whom all the land was divided, excepting only the portion appertaining to the justice of the precinct, as appears by the possession given by the said governor, and another small surplus portion which by the consent of all is set aside for the benefit of the

blessed souls in purgatory, on condition that the products are to be applied annually to the payment of three masses, the certificates for which to be delivered to the alcalde in office of said jurisdiction. And after having made the distribution I proceeded to mark out the boundaries of said tract from north to south, being on the north a hill situated at the edge of the river above the mouth of the ditch which irrigates said lands and on the south the point of the
65 hill of pueblo and the valle called Temporales, a large portion of land remaining to the south, which is very necessary for the inhabitants of this town who may require more land to cultivate, which shall be done by the consent of the justice of said town who is charged with the case and trust of this matter, giving to each one of those contained in the list the amount he may require and can cultivate; and after having completed all the foregoing, I caused them all to be collected together and notified them that they must each immediately erect mounds of stone on the boundaries of their lands so as to avoid disputes, and I also notified them that no one was privileged to sell or dispose of their land until the expiration of ten years from this date, as directed by said governor, who, if he be so pleased, will certify his proper approval at the foot of this document, of which a copy shall remain in this town and the original be deposited in the archives where it properly belongs. Done in the aforesaid town, on the day, month and year above mentioned; signed with my hand with two attending witnesses when I act in the absence of a public or royal notary, there being none of any description on this kingdom. I certify.

(Signed) PEDRO BAPTISTA PINO.

'Attending:

'JOSE MIGUEL TAFOYA.'

Here followed the list of fifty-eight individuals, with the number of varas each one received, running from forty-nine varas in one instance to two hundred and thirty in another, sixty-five varas being allotted in thirty-eight instances.

'There are contain*i*ned in this list fifty-eight families.

'San Miguel del Bado March twelfth, one thousand eight*h* hundred and three.

'PEDRO BAPTA PINO.

'Given gratis, together with twenty-odd leagues travel.

('Pino's Rubric)

"By virtue of what has been done by Pedro Pino, senior justice of second vote of this capital town of Santa Fe concerning the distribution of lands made in the name of His Majesty to the residents of the new town of El Bado, known as San Miguel, I declare
66 the aforesaid residents of El Bado the lawful owners thereof, approving and confirming the possession given by said Senior Justice Pedro Pino; and in order that it may so appear in all time, I signed this at Santa Fe, New Mexico, on the 30th day of March, 1803.

'FERNANDO CHACON.'"

The court of private land claims held that the effect of these muniments of title was to vest in the parties named therein the title to the entire tract of land described. Upon appeal, however, the Supreme Court of the United States held that the title of the crown was divested only as to the allotments described in the several acts of possession and that the remainder continued in the former sovereignty and passed to the United States by the treaty.

The claim of the government which was sustained in that case is stated by the Supreme Court as follows:

"The contention on behalf of the United States is that the court of private land claims had no power to confirm lands situated as these were, within the outboundaries, that had not been allotted prior to the date of the treaty because under the laws of Spain and Mexico, the jus disponendi of all unassigned lands remained in the government and passed to the United States."

Dealing with this contention the court said:

"Did the fee to lands embraced within the limits of the pueblo and intended for community use continue to remain in the sovereign or did it pass to the pueblo?

Answering this reference to the previous case of the United States v. Santa Fe, 165 U. S. 675 the court said:

"Under the laws of the Indies, lands not actually allotted to settlers remained the property of the King, to be disposed of by him or by those on whom he might confer that power. * * * Towns were established in two ways: By their formation by empresarios or contractors, the title to the lands granted vesting in the contractors and settlers, minute provisions being made in relation thereto: By individuals associating themselves together for that purpose
67 and applying to the governor of the province, through whose action a city, villa or place was established. These municipalities appear to have been quasi corporations, corporations sub modo, and their ayuntamientos exercised political control over the pueblos and over surrounding country attached to their jurisdiction. The alcalde made allotments subject to the orders of the ayuntamiento, and they were again apparently subject to the provincial deputation or an equivalent superior body. At all events unallotted lands were subject to the disposition of the government."

The next case dealing with the subject was Rio Arriba Land & Cattle Co. v. United States appealed from the court of private land claims and reported in 167 U. S. 298. The title papers in that case were as follows:

"I, Francisco Salazar ensign in the militia of Abiquiu, together with my brothers (Hermanos) and twenty other poor and needy citizens, appear before your excellency (and state), that I have examined a tract of land, unappropriated and unsettled, called the Chama River Canon, situated about four leagues distant from this place, and for which we petition your excellency in the name of the King and without injury to any third party, as we find ourselves without any land wherefrom to support ourselves, owing to the decease of our mother at the rancho off of which she supported us, and as the latter has this day been divided among nine heirs resid-

ing in other jurisdictions we find ourselves absolutely deprived of any place to plant and to enable us to pay tithes and first fruits.

We therefore humbly ask and *and* pray your excellency to heed this our petition, and we trust from the charitable heart of your excellency you will consider the same favorably, and we protest our petition not to be made in dissimulation and whatever be necessary, etc."

This petition was referred, July 6, 1806, by the governor to the alcalde in these words:

"The alcalde will report fully on this petition, giving the extent of the land in question, its boundaries, the proportion of ir-
68 rigable land, and when he comes to say how many settlers it will accommodate and the application being made public he will report whether any damage may result to any of the surrounding settlers, either in regard to pasturage, water or watering places, and he will make personal examination respecting all these matters, to the end that action may *he* had in accordance with his report and subsequent questions avoided."

On July 14, 1806, the alcalde made the following report:

"I, Manuel Garcia de la Mora, chief alcalde, in obedience to the foregoing decree, proceeded personally to visit and examine the spot (rio) called the Chama river cañon, over all of which I passed with the greatest care and observation, as well as the land itself as the places for taking out the heads of irrigating canals and the pastures and watering places, and I report that for pastures without fields and without any resulting damage there is one leag-e from the last grant (that of the Martinezes) to the side on which the sun rises, and that thence to the western boundary, which divides the said Chama river cañon from the Gallina river, there are about two leag-es, somewhat more or less, cultivable land, and the town being placed in the center, the thirty-one families applying for it may be accom--odated and land enough remain for the increase they may have in the way of children and sons-in-law (hijos y Llernos), and the section of the country is a very desirable one, and the settlers may therefore proceed with their buildings, and for the other two boundaries there is assigned them on the North and on the South one leag-e for pastures, for on these two sides no injury can result, as there is neither a settlement or grant now made or that might be made, and the heads of acequias along the length of the planting land there are five or six of them."

"With all the foregoing I have fulfilled your excellency's order. the same having been read faithfully and quite audibly to all the community, they replied that they had nothing to represent in regard to said petition, and that no one of them was injured, the land being uncultivated and unsettled, and the said cañon is distant from Abiquiu about five leag-es."

69 On August 1, 1806, Governor Alencaster decreed:

"In pursuance of the foregoing report, that the said alcalde may proceed to the assignment of twenty-six lots of land capable of being planted with the equivalent of three courtillas of wheat, one ditto or three almudes of corn, another three of beans, and of hav-

ing erected on each of them a small house with a garden, and of these lots two of them adjoining one another will be assigned to the Ensign Francisco Salazar and the remaining twenty-four to the individuals who, upon report made by the said alcalde, may obtain my decree that they be assigned lands, the said assignments to be made in such manner that lands may remain unassigned equally on the four sides, or at least on two of them, so that new assignments may be made in the future, and the lines bounding with the adjoining lands to be described in order that the rights to pastures and watering places may clearly appear; to the said parcel of lots held by the twenty-five settlers will be given the name of 'San Joaquin del rio de Chama,' and the said alcalde, having received the said twenty-five titles to settlers, will proceed to deliver and distribute, give possession, and make grant, in the name of His Majesty, to the twenty-four settlers aforesaid, and the said Ensign Salazar, being appointed justice and all the foregoing provisions being verified, the granting document will be remitted to me to be legalized as required, the proper duplicates (testimonios) to be given the parties interested and then the original to be returned, to be duly deposited among the archives of this office."

On March 1, 1808, the alcalde made this report:

"I, Manuel Garcia de la Mora, chief alcalde of the town of La Canada, proceeded to the rancho de San Juaquin, and in view of and in obedience to the foregoing decree of Lieutenant Colonel Joaquin del Real Alencaster, governor of this royal province, I, said Chief alcalde, proceeded to the Chama River Cañon, called the San Joaquin cañon, accompanied by the twenty five settlers; and there appearing also fourteen other citizens without land, and his excellency having given me verbal instructions to the effect that should other persons come forward to increase the settlement land should also be assigned to them with the same right as the others enjoy, and all the settlers being assembled, I proceeded with the distribution of the land to them as appears from the quantities of land they received, noted in the list and certified by me, and into the possession of which I placed them, taking them by the hand and leading each settler over his own piece of land and placing him in possession in the name of the King, whom may God preserve; and they ran joyfully over the land plucking up weeds and casting stones and shouting aloud 'Long live the King that protects and helps us,' with which they remain in possession, naming the town whose site I pointed out to them, San Joaquin del Rio de Chama, and with which I have executed the foregoing decree and all of which is authenticated with two instrumental witnesses, designating to the settlers as boundaries—on the north, the Cebolla Valley; on the south, the Capulin; on the east, the boundary of the Martinezes; and on the west, the Little White hill, (segita blanca), for their pastures and watering places and with a view to coming of other settlers and the increase of families and descendants; all of which I signed with two instrumental witnesses and with the witnesses in my attendance, with whom I act by appointment for lack of a royal or public notary, there being none of any kind in this royal province; to which I certify."

In that case it was likewise contended that the title to the entire tract passed to the parties named in the papers but his contention, following United States v. Sandoval supra, was overruled, the court holding "that as to all unallotted lands within exterior boundaries whose towns or communities were sought to be formed, as in this instance, the title remains in the government for such disposition as it might see proper to make" and that "the only title which was passed on or contended to be passed was to the various allotments which were actually made."

Another case in which the same question is involved was
71 United — v. Pena which is reported under that title, on appeal from the court of private land claims, in 175 U. S. 500. The title papers in that case are thus described in the opinion of the court just cited:

"In 1836, Jose Julian Martinez and others made application to the ayuntamiento of Ojo Caliente for a tract of public land, called 'the Petaca.' That body declared its opinion that the grant should be made, and thereupon the governor signed this order:

"SANTA FE, *Feb.* 25, 1836.

'Having seen the action of the ayuntamiento of Ojo Caliente of date 22 instant, in which they say there is no objection to granting the applicant and his associates the land mentioned, the former grantees not possessing now any right herein, they having abandoned the same, the alcalde of said place will place those who now apply for the same in possession thereof in the required form and in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of said possession, and without prejudice to any thirt party; also binding the grantees to the obligations prescribed by the laws to acquire title, for which purpose the alcalde shall take charge of the general document of distribution, which shall be for the archives, and he shall give testimonios therefrom, as may be requested of him, on payment of his corresponding fees.

'PEREZ.'

In pursuance of this order the alcalde proceeded to give juridical possession, and this is the report of his action:

'For the years one thousand eight hundred and thirty-six and eight hundred and thirty-seven.

'At Santa Cruz del Ojo Caliente, jurisdiction of this name, on the 25th day of the month of March, one thousand eight hundred and thirty-six, in compliance with the decree of the civil and military governor, of the territory of New Mexico, Alvino Perez of date February 25, of the same year, in which he directs me to place in possession the petitioners who have applied for the Betaca tract of lan- and as is set forth in their petition of date 29th of January of the same year, I proceeded to distribute said land in the pres-
72 ence of the parties interested, giving to each one of these mentioned in the list one hundred and fifty varas in a direct line designating to them as their boundaries on the south the en-

trance to the cannoncito and lands of Jose Miguel Lucero, on the north the hill commonly called the Tio Ortiz Hill, on the east creek of the aguaje of the Petaca and on the west the boundary of the Vallecito grant, within which limits the said new grantees were located. Of these I donated only to citizens Felipe Jaquez from the boundary of Vincente Martin to that of Eusebio Chaves, the land being a narrow strip and of little utility; thereupon I donated to citizens Manuel Lujan two small valleys, which were not measured with the line and reach to the distribution of the said cannoncito, and I donated to citizen Marinao Pena two small valleys, very narrow, without varying; and, continuing, I donated to citizen Antonio Elauterio Ortiz, in the same canoncito, a small valley, also without varying, following the same course in the said canoncito, I donated to citizen Jose Francisco Lucero a small valley, also without varying, and to Jose Antonio Lucero another small valley, the boundary thereof being on the south the mouth of the same canoncito, leaving therefor a plaza a hundred and fifty varas, and fifty of Women's gardens and fifty of ingress and egress, there remaining at the mouth of the canada de la Dorada, for common watering places, one hundred and fifty varas in a direct line, which donation I made in the name of the national sovereignty, in conformity with the law on the subject, the grantees mentioned in the annexed list understanding that the pastures, forests, waters and watering places are in common, and they were further informed that he who fails to occupy and cultivate the land granted within the term of five years, in order to acquite title, the same cannot be by him sold, exchanged or alienated, not will he be admitted in a new settlement; and if any should of their own accord abandon the tract, they remain informed further that they possess no right, such being the requirements of law; and being informed of and agreeing to all
73 this, they received and accepted possession in virtue of which they plucked up herbs, leaped, cast stones and shouted with joy, saying, Hod be praised, long live the nation, long live the sovereign congress and the laws that governs and protects us, and other manifestations of pleasure, by virtue of which they took possession; and, that it may so appear at all times, I, under this decree, signed this grant and donation with all the authority His Excellency was pleased to confer upon me for the purpose set forth in the above petition and expressed in said decree attached to the present grant, the witnesses being the citizens Jesus Maria Barela and Jose Maria Barela and Jose Francis Lucero, as properly made.

'JOSE ANTONIO MARTINEZ.
'JESUS MARIA BARELA.

'There was given to Juan de Jesud Jaquez from the boundary of Jose Gabriel Vigil to a pinabete on the north; (Rubric).'

Valid."

At the close of this follows the list referred to in the report.

Dealing with this matter the court says:

"What was the scope and effect of this grant? Obviously we think to give to each individual named in the list the particular

tract set apart to him. It was a grant in severalty and not one of a single large tract to several persons to be by them held in common or distributed among each other. It matters not that the petition for this grant was in the name of only two or three individuals, for it was not uncommon thing for one or more to appear, as the representatives of a body or a number of persons. The language of the order of the governor seems to contemplate a grant in severalty, for it speaks of "the general donation, in which shall necessarily be stated the boundaries of said possession." The outer limits within which the grants are to be made are to be stated, and within those limits the several grantees are to have their possessions. Again, the provisions that 'the Alcalde shall take charge of the general document, of distribution' and 'give testimonios therefrom as may be requested,' carries the same suggestion. The alcalde is to take charge of this general document for filing in the archives, but while
74 holding it he is to give testimonios from it to the several parties who receive grants within the outboundary limits.

But whatever doubts might arise from an examination of the governor's order, if that was the only document to be considered, the report of the alcalde's proceedings shows affirmatively that he distributed the lands in the presence of the parties interested, 'giving to each one one hundred and fifty varas in a direct line'. He evidently understood that he was to distribute this land among certain individuals. He proceeded to do so and gave juridical possession accordingly. Whatever may be thought of his interpretation of the governor's order, the only jurisdical possession which is shown to have been given is juridical possession in severalty to the parties named in the list. The original petitioners were never put, so far as the record shows, in juridical possession of the entire tract, and such a grant, if it was so intended, was never made effective by any juridical possession. We think it more in consonance with justice and equity to hold, not that the grant was of an entire tract which never became operative because of a failure to give juridical possession, but that the alcaldes rightfully understood it as a grant in severalty, and giving juridical possession vested in the grantees the tracts of which they were so placed in possession. United States v. Santa Fe, 165 U. S. 675; United States v. Sandival, 167 U. S. 278; Rio Arriba Land & — Co. v. United States, 167 U. S. 298."

Still another case came before the court of private land claims involving this question, that being the Fernandes de Taos grant which was tried before that court under the title of Juan Santistevan v. United States. The material title papers there involved were as follows:

"On the first day of May, of the present year one thousand seven hundred and ninety-six, I, the Alcalde Mayor and War Captain of the Pueblo of Taos and its districts, Don Antonio Josef Ortiz, in obedience to that which was ordered by Lieutenant Colonel Don Fernando Chacon, Knight of the order of Santiago and Civil
75 and Military Governor of this Kingdom, I, the said Alcalde Mayor, before going to the place of the said tract of the Rio

de San Fernando, in company with two witnesses who were Don Antonio Josef Lovato and Don Lorenzo Lovato, there being present the sixty three families I explained to them the petition which they had made and I informed them that to obtain such possession they must keep and observe the following conditions in due form of law: That the said place must be common not only to them but to all who may hereafter join the settlement, and that in view of the exposed situation of the place they shall be provided with fire arms or bows and arrows which arms shall be inspected at the time of their entrance as well as at any other time that the alcalde may direct, with the understanding that within two years after taking possession all the arms which they have shall be fire arms under the penalty that those who do not provide themselves shall be dismissed from the said settlement; that the town which they build shall be like that they describe in their petition; and they all together and each one for himself having heard the said conditions they replied unanimously that they knew and understood that which had been explained to them and I therefore took them by the hand and I said in a clear and intelligible voice that in the name of His Majesty (whom may God preserve) and without prejudice to his royal estate nor to that of any third party I walked with them over the said lands and they pulled up grass and threw stones and shouted, saying 'Long Live the King' taking possession of the said lands quietly and peaceably without any opposition, their boundaries being designated for them, and they are: On the west, lands of Don Antonio Josef Lovato below, in the bottom, and above, the middle road; on the east the cañnon of the Rio San Fernando; on the South, the Ceja which is on the other side of the river, and on the north, the boundary line of the Indians of Taos, with the notification that the pastures and watering places are common, and in order that it may so appear I signed it as Receptoria in the absence of a notary of which there is none with my assisting witnesses
76 with whom I act to which I certify.

ANT. JOSEF ORTIZ.

Pueblo of San Geronimo de Taos, November 7, 1797.

"The settlers of the Rio de San Fernando having petitioned the Lieutenant Colonel, Governor of this Kingdom, Don Fernando Chacon that he would be pleased to grant them, in the name of his Majesty, (whom may God preserve) the surplus of the waters of the Taos River and that the Lucero and His Excellency having given the order to me the said Alcalde Mayor in order that I should do so in the name of his Majesty, I give them the present for their better protection. To which I certify.

ANT. JOSEF ORTIZ.

"In the City of Sante Fe, of New Mexico, on the ninth day of the month of August, one thousand seven hundred and ninety-nine, I Don Fernando Chacon, Civil and Military Governor of the said Province, granted the possession of lands which in the name of his Majesty was given to the settlers located at the place of San Fernando

for them, their children and successors, without power ever to alienate or sell and permitting them as poor persons, to include within two sheets of stamped paper the particular possession given to each settler with the amount belonging to him, and I signed it with my Secretary in the absence of a notary royal or public of which there is none in this province.

FERNANDO CHACON.

JOSEF PASCUAL CARGIA.

Following the foregoing document was one giving a list of settlers with the number of varas allot-ed to each.

The Court of private land claims, viewing these title papers in the light of the three cases above cited, held that the title conveyed by the government covered only the several allotments and did not include unallotted or non-agricultural land, these being reserved for the crown either for future allotment or as royal estate.

It only remains to determine whether the title papers in the present case first above quoted, came within the rule shown to be applicable to the cases last mentioned. It is with the view that this might be clearly developed that the title papers in the other
77 cases have been quoted at such length. We are of the opinion that the Tome title papers reasonably partake of the same nature as those involved in the several cases dealt with by the court of private land claims. The petition was in order to found a settlement. The grant as made by the Governor Mendoza was to the *partitioners* but not to them only. It ran in favor of "whoever may have a right thereto under the conditions and circumstances required in such cases" and it distinctly provides that it is to be "without prohibition to any one desiring to settle the same." The Governor expressly provides for allotments by ordering that there shall be given to each one "the portion he may be entitled to in order to avoid difficulties which may occur in the future." The act of juridical possession shows that among those who appeared for the purpose of being given allotments were a number not named in the original petition and that indeed a number of the original petitioners did not appear. This demonstrates that in the minds of the parties present for juridical possession the grant was not deemed to be confined to the original petitioners but was with a view to a settlement in which all who were willing to join in the common enterprise were entitled to receive allotments. This condition brings the case in our judgment clearly within the rule stated in the cases above mentioned. In other words, the only title which passed from the crown was to the allotments and these to each of the allottees respectively and not to the community to be held in common as the property of all. The outlying land remained in the crown subject, however, to use for pasturage and other purposes by the members of the community. That this last, however, constituted a title in no sense, but simply a permissive use at the pleasure of the crown, is pointed out in the Sandoval Rio Arriba Company and Pena cases above referred to. The similarity between the present

title papers and those in the Pena case impresses us as particularly noticeable.

This being the nature of the Tome title papers we hold, with the contention of the appellees, that when Congress came to act
78 upon this claim in 1858 it passed as the property of the United States to the town of Tome all of the land not previously allotted to settlers. This thus partook of the nature of an original grant to that town and to its successors the present defendant corporation. The grant was burdened with no trust in favor of plaintiffs as the successor in title to certain of the original allottees, and the court below was therefore right in declining to impress upon the confirmation any such declaration of a trust.

The judgment is affirmed.

WILLIAM H. POPE,
Chief Justice.

We concur:
JOHN R. McFIE, *A. J.*
FRANK W. PARKER, *A. J.*
IRA A. ABBOTT, *A. J.*
E. R. WRIGHT, *A. J.*
CLARENCE J. ROBERTS, *A. J.*

Associate Justice Mechem having tried the case took no part in this decision.

And afterwards, on to wit *on* the 8th day of February A. D. 1912, there was filed in the office of the Clerk of the Supreme Court of the State of New Mexico, a Præcipe for record in the above entitled cause, which said præcipe for record was and is in the following words and figures to wit:

79 In the Supreme Court of the State of New Mexico, January Term, A. D. 1912.

No. 1384.

GEORGE W. BOND et al., Appellants,
vs.
UNKNOWN HEIRS OF JUAN BARELA, Deceased, et al., Appellees.

Appeal from District Court, Valencia County.

Præcipe for Record.

Honorable Jose D. Sena, Clerk Supreme Court of the State of New Mexico.

SIR: Kindly prepare record in the above case for the Supreme Court of the United States, as follows:

1. Complaint.
2. Answer of Town of Tome.

3. Answer of Doroteo Chaves et al.
4 Demurrer to Answer.
5. Stipulation.
6. Order overruling Plaintiffs' Demurrer to Answer.
7. Reply *to* Plaintiffs to Answer to Town of Tome.
8. Reply of Plaintiffs to Answer of Doroteo Chaves et al.
9. Defendants' Demurrer to Replies.
10. Order Sustaining Defendants' Demurrer to Replies.
11. Order Granting Appeal to the Supreme Court of the Territory of New Mexico.
12. Appeal Bond.
13. All Court orders and Pleadings in Supreme Court.
14. Opinion and Judgment of the Supreme Court of New Mexico.
15. Order Granting Appeal to the Supreme Court of the United States.
15. Assignment of errors on Appeal.
16. Waiver of Citation.
17. Stipulation as to value of property in controversy.

(Signed) RICHARD H. HANNA,
FRANCIS C. WILSON,
Attorneys for Appellants.

Office & Post Office address, Santa Fe, New Mexico.

I hereby acknowledge service of this Præcipe and waive time for service of the same and waive the filing of further præcipe for the Appellees.

(Signed) F. W. CLANCY,
Attorney for Appellees.

Office & Post Office Address, Santa Fe, New Mexico.

80 STATE OF NEW MEXICO,
Supreme Court, ss:

I, Jose D. Sena, Clerk of the Supreme Court of the State of New Mexico, do hereby certify that the above and foregoing seventy-nine (79) pages contain a full, true and complete transcript of the record and proceedings, pleadings and opinion in the above entitled cause as the same remain on file in my office which are hereby transmitted to the Supreme Court of the United States in accordance with an appeal heretofore granted herein.

Witness my hand and the seal of the Supreme Court of the Territory of New Mexico, this the 12th day of February, A. D. 1912.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court, State of New Mexico.

Endorsed on cover: File No. 23,068. New Mexico Territory Supreme Court. Term No. 558. George W. Bond et al., appellants, vs. Unknown Heirs of Juan Barela, deceased, et al. Filed February 21st, 1912. File No. 23,068.

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BRIEF FOR APPELLANTS

Supreme Court of the United States

October Term, 1912

No. 565

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO

George W. Reed, et al., Appellants
vs.
Unknown Heirs of John Woods, deceased, et al.

Edward R. Hanna
Frederic C. Wilson
Attorneys for Appellants

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1912.

George W. Bond, et. als.,
Appellants,

vs.

The Unknown Heirs of Juan Barela, et. als.,
Appellees.

No. 558.

STATEMENT OF THE CASE.

This is an appeal by George W. Bond, et. als., from a judgment of the Supreme Court of the Territory of New Mexico, affirming the decision of the District Court of Valencia County of the Territory of New Mexico in a suit which was filed in the latter court by the appellants for the partition of the Grant known as the Tome Grant, situate in Valencia County, State of New Mexico.

The complaint described the Grant, set out the patent, alleged that the plaintiffs were owners in fee simple and in common of an undivided half share, part and interest in said Grant, and that unknown defendants claimed some undivided part, share and interest in the Grant as being successors or assigns of the original grantees or otherwise adverse to the plaintiffs. To this complaint the defendants, the Town of Tome, Doroteo Chaves and three hundred ninety-one others filed answers, setting up that the Grant was confirmed to the Town of Tome as a Town Grant by Act of Congress on the 22nd day of December, 1858, and that patent was issued to the Town of Tome on the 5th day of April, 1871. It was further alleged in the answers that the Town of Tome was a regularly organized and existing municipality under the Span-

ish and Mexican governments, and that in the year 1892 the Town of Tome Land Grant was incorporated under the Act of the Legislative Assembly of the Territory of New Mexico, entitled "An Act Relating to Community Land Grants and for Other Purposes," which became a law February 26, 1891, and that the incorporation operated to vest in the defendant, the Town of Tome, the legal and equitable title to all the lands within the exterior boundaries of this Grant, and finally as to the title vested in the corporation by the alleged incorporation of the Town, the answer pleads adverse possession for more than ten years, running from the date of the incorporation, to-wit, in the year 1892, as against the planitiffs herein. To the answer of the Town of Tome and the other defendants a demurrer was filed by the plaintiffs which sets up that as a matter of law the allegation that the Grant was a Town Grant and therefore not subject to partition, and that the allegation of the incorporation of the Town of Tome and the title thereby vested in said Town were not sufficient to bar the plaintiffs' right to partition. This demurrer was argued upon the complaint, answers, the expediente of title, the petition of the Surveyor General for confirmation and the report of the Surveyor General, of which the last three documents were incorporated in full in the record by stipulation. The Court overruled the demurrer.

The plaintiffs then filed a reply admitting the allegations of the answer as to the creation of the Grant except as to that portion of paragraph "a" of the answer of the Town of Tome, in which the pleader seemed to convey the idea that possession was not delivered to the entire tract to the grantees by the alcalde who placed them in possession, and as to that portion of the paragraph, the reply denies that such was the case and sets up that the petitioners were placed in possession of all the common lands of the Grant and were not confined to the allotments by the terms of the act of possession. A translation of the juridical act of possession is attached as an exhibit to the reply.

Again in order to avoid the impression given by the pleader in paragraph "b" of the answer, that only the inhabitants of Tome appeared before the Surveyor General, the reply further denies that it was alone the inhabitants of Tome who presented a petition to the Surveyor General for confirma

tion in 1856, and alleges that the petitioners were inhabitants of the entire Grant and were not confined to the Town of Tome, and specifically points out that the application to the Surveyor General was made by all those living on the Grant who claimed to be heirs of the original grantees, or who had acquired interests from such heirs by purchase, or otherwise.

The reply also denies, on information and belief, that the Town of Tome was a regularly organized and existing municipality under the Spanish and Mexican laws, as alleged in paragraph "d" of the answer of the Town of Tome, and furthermore there is a denial of the allegation contained in the answer of the defendant, the Town of Tome, of the incorporation of said Town, and alleges the fact to be that the said corporation was unlawfully and illegally constituted and has since the date of its pretended incorporation never complied with the laws under which it was organized.

The reply then proceeds to deny that by virtue of said pretended and alleged incorporation the legal and equitable title in said Grant was vested in the pretended corporation, the Town of Tome, and denies in specific terms that any title has vested in said pretended corporation since the date of the incorporation by adverse possession or otherwise, which would exclude the heirs, successors and assigns of the original grantees from their right to partition, and alleges that the heirs, successors and assigns of the original grantees of said Grant are the sole owners in common of the common lands of the Grant, and that the Town of Tome has no right, title or interest in said lands which a court of equity can recognize except that of a trustee holding the legal title in trust for said heirs, successors and assigns of the original grantees.

To this reply defendants filed a demurrer which, in its material parts, raised the same questions as were raised in the preceding demurrer to the answer of the Town of Tome, filed by the plaintiffs. This demurrer to the reply was sustained and judgment against the plaintiffs entered upon the pleadings, dismissing the case. From this judgment appeal was taken to the Supreme Court of the Territory of New Mexico, where the judgment of the lower court was affirmed, from which judgment of the Supreme Court this appeal was prosecuted to the Supreme Court of the United States.

This suit was originally brought under Article 15, of Chap-

ter 107 of the Session Laws of New Mexico for the year 1907, which is as follows:

"Sub. Sec. 266. When any lands, tenements or hereditaments shall be owned in joint tenancy, tenancy in common, or co-parcenary, whether the right or title be derived by donation, grant, purchase, devise or descent, it shall be lawful for any one or more persons interested, whether they be in possession or not, to present to the district court their petition in chancery, praying for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition cannot be made without great prejudice to the owners.

Sub. Sec. 267. Every person having an interest in the premises, whether having possession or otherwise, or whether such interest be based upon the common source of title or otherwise, shall be made a party to such petition, and in cases where one or more of such parties shall be unknown, or the share or quantity of interest of any of the parties is unknown to the plaintiff, or when such shares or interest shall be uncertain or contingent, or when there may be any other impediment, so that such parties cannot be named, the same shall be so stated in the complaint.

Sub. Sec. 268. All persons interested in the lands, tenements or hereditaments of which partition is sought to be made, whose names are unknown, may be made parties to such partition by the name and description of unknown owners or proprietors of the premises, or as unknown heirs of any persons who may have been interested in the same.

Sub. Sec. 269. During the pendency of such suit or proceeding, any person claiming to be interested in the premises may appear and answer the petition or complaint and assert his right by way of intervention, whether such interest be derived or claimed under the common source of title or otherwise, and the court shall decide upon their rights as though they had been made parties in the first instance.

Sub. Sec. 270. The court shall ascertain and declare the rights, titles and interests of all the parties to such proceedings and render such decree as may be required by the rights of the said parties, which said decree shall be binding upon all of the said parties, whether they be adults or not.

Sub. Sec. 271. The court, when it shall decree a partition of any premises, shall appoint three commissioners not connected with any of the parties either by consanguinity or affinity and entirely disinterested; each of whom shall take an oath before some person authorized to administer the same, fairly and impartially to make partition of the said premises in accordance with the decree of the court as to the rights and interests of the parties, if the same can be done consistently with the interests of the estate, and the said commissioners shall go upon the premises and make partition of said lands, tenements and hereditaments, assigning to each party his share by metes and bounds, and shall make report in writing, under their hands, to the court, with all convenient speed, or within the time which may be prescribed by the court, and the court may upon the coming in and filing of such report make all such orders thereon as may be necessary to a final disposition of the case.

Sub. Sec. 272. When any lands, houses or lots are so circumstanced that a partition thereof cannot be made without manifest prejudice to the owners or proprietors of the same, and the commissioners appointed to partition the same shall so report to the court, the court shall thereupon make an order for the sale of such lands, houses and lots, in such manner and upon such terms, and by giving such notice of the sale as the court shall direct, and the person or persons who shall be appointed by such order to make sale thereof, shall make and execute good and sufficient conveyance or conveyances to the purchaser or purchasers thereof, which shall operate as an effectual bar both in law and equity against such owners and proprietors, parties to the proceedings, and all persons claiming under them; and the person or persons making such sale shall report their proceedings to the

court and shall pay over the moneys arising therefrom to the parties entitled to receive the same under the direction of the court.

Sub. Sec. 272-a. No suit for a partition shall abate by the death of any tenant, but upon the death of any tenant being a party to said suit, the heirs or devisees of the said tenant may on motion be made parties in his stead."

SPECIFICATION OF ERRORS.

On appeal to this Court, appellants submit the following points as reversible errors in the decision of the Supreme Court of the Territory of New Mexico:

a. In holding and deciding that the grant made to Juan Barela and his companions in the year 1739 by the Captain General and Governor of New Mexico, Gaspar Domingo de Mendoza, was not a grant to the entire tract petitioned for, but only to the allotments in severalty.

b. In holding and deciding that said grant to the petitioners was made with a reservation of title in the Crown to the common lands of the Grant.

c. In holding and deciding that the Act of Congress of December 22nd, 1858, confirming to the Town of Tome said Grant, operated as a grant de novo to said Town and vested in it a complete legal and equitable title to the Grant.

d. In holding and deciding that said Grant was not complete and perfect in the heirs, successors, and assigns, as tenants in common, at the time of the Treaty of Guadalupe Hidalgo.

e. In holding and deciding that the Congress of the United States, by said Act, did not confirm a complete and perfect title and that said Act of Confirmation to the Town of Tome did not inure to the benefit of the heirs, successors and assigns of the original grantees.

f. In holding and deciding that the expediente of title, the petition of the heirs, successors and assigns of the original grantees, to the Surveyor General of New Mexico, dated August 6th, 1856, and the findings of the Surveyor General dated September 2nd, 1856, do not constitute a chain of evidence sufficient to support a valid and subsisting title by prescription against the Spanish and Mexican governments, prior to

the Treaty of Guadalupe Hidalgo, to the entire tract by the heirs, successors and assigns, of the original grantees, as tenants in common.

g. In holding and deciding that the incorporation in the year 1892 of this grant, under the provisions of an Act of the Legislative Assembly of the Territory of New Mexico, entitled, "An Act Relating to Community Land Grants and for other Purposes," which became a law February 26th, 1891, vested in said alleged corporation such a legal and equitable title to this grant as would, at any time thereafter, bar the tenants in common from their right to partition the common lands of the grant.

BRIEF OF ARGUMENT.

1. By acting upon and adopting the report of the Surveyor General as the basis of the Act of Confirmation, Congress confirmed in effect the Tome Grant as complete and perfect in the heirs, successors and assigns of the grantees, and not as an inchoate and imperfect town grant, such as the decision of the Supreme Court of New Mexico in this cause must necessarily have been based upon.

2. The political department of the government having in effect confirmed the grant as complete and perfect in the heirs, successors and assigns of the grantees, that action cannot be reviewed and reversed by any court in the land.

b. The cases cited by the Supreme Court of New Mexico in support of its decision are not in point since they were cases upon which Congress had never acted, and the grants involved were rejected for lack of jurisdiction in the Court of Private Land Claims to dispose of lands held to belong to the United States.

2. The findings of the Surveyor General were justified by the facts before him.

a. The documents of the expediente of title construed together and in the light of conditions at the time the grant was made show an intention to make an absolute grant to Juan Barela and his companions.

b. According to the petition of the claimants submitted to the Surveyor General, the petitioners applied as the heirs, successors and assigns of the original grantees, and not for or in behalf of the Town of Tome, and set up in themselves and their predecessors in title undisturbed possession for one hundred and seventeen years, which constitutes a sufficient claim of title to support prescription against the Spanish Crown, whatever the nature of the original grant may have been. No denial of this claim appears in the record and the Surveyor General found it to be true.

3. Assuming that the foregoing premises establish the tenancy in common of the heirs, successors and assigns, then the confirmation to the Town of Tome operated to vest in the confirmee nothing but the legal title to the common lands and courts of equity will hold the patentee as the trustee for those who have equitable rights in the lands, to the full extent of their interests.

a. The recommendation of confirmation to the Town of Tome contained in the Surveyor General's report, being inconsistent with his findings and the result of his erroneous interpretations of his instructions, the confirmation should be construed by a court of equity to create a trust in the Town of Tome so as to accord with the true intent of the Surveyor General and of Congress, as indicated by the findings, without inflicting an injustice and great loss upon the real owners of the grant by taking from them rights which they were found to possess at the time of the treaty of Guadalupe Hidalgo.

4. Again assuming that the foregoing establishes a tenacy in common with the right to partition, it is contended that this right could not be wrested from the tenants in common by the alleged incorporation of the Grant under the provisions of the Act of the Territorial Legislature, entitled, "An Act Relating to Community Land Grants, and for Other Purposes," which became a law February 26, 1891, as set up in the answer of the Town of Tome, for the reason that such incorporation must be the act of only a portion of the heirs,

successors and assigns, and the action of a portion of the tenants in common could not be construed to be in derogation of the rights of those who did not join in the incorporation.

ARGUMENT.

I.

EFFECT OF CONFIRMATION OF THE TOME GRANT BY ACT OF CONGRESS BASED UPON THE SURVEYOR GENERAL'S REPORT.

The material portions of the Act of Congress confirming the Tome Grant is as follows:

> "Be It Enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * * also the claim number two of the town of Tome reported upon favorably by the surveyor general of New Mexico in his report of the thirtieth of September, eighteen hundred and fifty-six, to the Department of the Interior * * * * be, and they are hereby confirmed, and the Commissioner of the Land Office shall issue the necessary instructions for the survey of all of said claims, as recommended for confirmation by the said surveyor general, and shall cause a patent to issue therefor as in ordinary cases to private individuals; Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said land, and shall not affect any adverse valid right, should such exist. Chapter 5, Act of Congress, approved December 22, 1858, United States Statutes at Large, Vol. 11, page 374."

The Act of Congress of July 22, 1854. (Statutes at Large, Vol. 10, page 309), created the office of Surveyor General for New Mexico and Arizona, and conferred upon him certain powers for the determination of land titles in the two territories which were protected by the terms of the Treaty of Guadalupe Hidalgo. The section material to this brief is as follows:

"Section 8. And be it further enacted, That it shall be the duty of the Surveyor General under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same, under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all Pueblos existing in the Territory, showing the extent and locality of each, stating the number of inhabitants in the said Pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior, which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight, between the United States and Mexico; and until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

From the above it appears that the Surveyor General had the power, and upon him the duty was laid to determine as to the origin, nature, character and extent, validity or invalidity, of Spanish and Mexican Grants, originating before the cession of territory included in New Mexico and Arizona to the United States.

In accordance with the provisions of this Act the claimants of the Tome Grant presented their petition before him and submitted their Grant to his inspection. The text of the petition is as follows:

"Territory of New Mexico,
Santa Fe County.

To the Hon. William Pelham, Surveyor General of the Territory of New Mexico:

Your petitioner, the inhabitants of the sitio of Tome, in the County of Valencia, New Mexico, would respectfully state to you, that in the year 1739, one Juan Barela and others petitioned one Gaspar Domingo Mendoza, then Captain-General and Governor of the province of New Mexico, under the Crown of Spain, for a grant of the sitio of Tome Dominguez. Your petitioners would further state, that said petition was duly presented, and being fully considered by said Governor, a grant of land was made to said petitioners on the 30th day of July, 1739, called the sitio of Tome Dominguez, situate now in the County of Valencia, and bounded on the west by the Rio del Norte; on the south by the stopping place called the Three Trees; on the east with the Sierra Madre, called Sandia; and on the north by la punta de los Esteros del Serro que llaman de Tome Dominguez; which said Grant was made to said petitioners and their heirs in fee, and was duly taken possession of by said grantees, in accordance with the forms of law then in force, and has ever since that time been in the quiet and peaceable possession of said grantees, their heirs and assigns, without any adverse claim of any kind from any source whatever. Your petitioners further state that the Town of Tome is situated on said grant, and the residence and farms of your petitioners, who have inherited the same from the original grantees, or acquired them by purchase. Your petitioners further state that they are not able to state the number of leagues contained within the boundaries of said Grant, as no survey of the same has as yet ever been made, but the boundaries mentioned in said Grant are well known and easily identified.

Your petitioners, the inhabitants of said sitio, to the end of that their title may be recognized and perfected under the act of Congress, in such case made and provided, herewith present a copy of said Grant for your

consideration, and report marked with the letter (W). All of which is respectfully submitted.

THE INHABITANTS OF TOME.

By JOHN S. WATTS, Attorney."

SURVEYOR GENERAL'S OFFICE.

"Santa Fe, New Mexico, September 30, 1856.

The foregoing is a true copy of the notice filed in this office by the attorney of the inhabitants of the sitio of Tome for a confirmation of their grant.

WM. PELHAM,

Surveyor General."

Page———of Transcript of Record.

Acting upon this petition and claim, the Surveyor General made his report, to which the confirmation refers and upon which the Act is based. The report is as follows:

"Town of Tome, Surveyor General's Office.

Santa Fe, New Mexico, September 2, 1856.

The claim of this town was filed in this office on the 6th day of August, 1856.

In the year 1739 Juan Barela and others petitioned Juan Gonzales Baz, the senior justice of the town of Albuquerque, to grant them a tract of land which had been previously granted to one Tome Dominguez, and which grant had been revoked by the governor and captain-general.

The petition was referred by the senior justice, on the 2nd day of July, 1739, to Gaspar Domingo Mendoza, governor and captain-general of the Territory, who granted them the lands in the name of his Majesty; and on the 30th day of July, 1739, Juan Gonzales Baz, senior justice and war captain of the town of San Phelipe de Albuquerque, and the districts under its jurisdiction, placed the said Barela and companions in possession of the so granted, with the following boundarie: On the west, the Del Norte river, on the south the place commonly called "Los Tres Alamos;" on the east the Sierra Madre, called Sandia; and on the north the point of the marsh of the hill called Tome Dominguez.

The original grant of the land embraced in this claim was selected from the archives of the Territory found at this place, but in so dilapidated a condition, and so much eaten by mice, that it is not legible. This office has therefore, acted upon a certified copy, made in the year 1836 by the claimant.

The signature of the governor and captain-general on the original grant, on comparison with others of the same officer in this office, appears to be genuine, and the boundaries on the original are complete, and correspond with those on the copy.

The heirs and successors of the parties to whom this grant was made have been in the peaceable possession of the land for one hundred and seventeen years, without adverse claim from any person whatsoever.

The decree and orders of the King of Spain, and the recapitulation of the Indians, conferred upon the governors of Territories under its jurisdiction the power of distributing the public lands, and this grant was made in pursuance of the power so vested, and the grant to the said Town of Tome is therefore approved and the Congress of the United States respectfully recommended to confirm the same, causing a patent to issue therefor by the proper department, and that the land embraced within the limits set forth in the grant be surveyed.

WM. PELHAM,
Surveyor General of New Mexico."

SURVEYOR GENERAL'S OFFICE.

"Santa Fe, New Mexico, September 30, 1856.

The foregoing is a true copy of the original on file in this office.

WM. PELHAM,
Surveyor General of New Mexico."

Page———, Transcript of Record.

It will first be noticed that the petitioners allege that the original grant was made to the grantees in fee and that they are the heirs, successors and assigns of the original grantees; that they, their ancestors and predecessors in title had been, ever since the grant was made to Juan Barela and his com-

panions, in peaceable possession of the land. No mention of the Town of Tome is made except the incidental statement that the town is located upon the grant. The town did not claim the land and was not the applicant for confirmation.

Upon this application and the proof, which was presumably adduced, the Surveyor General made his report in which he found literally that the allegations in the petition were true, that the grant was valid, that it was duly made and properly executed to Barela and his companions, and that they, their heirs and successors, had been "in peaceable possession of the land for one hundred and seventeen years, without adverse claim from any person whatsoever."

This was an unmistakable adjudication of the title as complete and perfect in the heirs, successors and assigns of the original grantees, at the time of the Treaty of Guadalupe Hidalgo, and as such a valid and subsisting title which would entitle the claimants to the protection guaranteed them under the terms of that Treaty. It must be presumed from the Surveyor General's findings that the petitioners proved the allegations in their petition, and that the title in the heirs and assigns of the grantees to the entire grant was satisfactorily shown to be complete and perfect when the jurisdiction was ceded to the United States. Notwithstanding his findings and for reasons which will be pointed out hereafter, the Surveyor General recommended confirmation to the Town of Tome.

The Act of Confirmation is by its own recitals shown to have been based upon the Surveyor General's report, and it is the contention of this brief that the entire report is as much a portion of the Act as though written into it. The findings of the report, therefore, that the grant was complete and perfect in the heirs and assigns at the time of the Treaty of Guadalupe Hidalgo is conclusive and cannot be reviewed by any court.

Tameling vs. United States Freehold and Emigration Company, 93 *U. S.* 644-663; 23 *L. Ed.* 998.

Astiazaran vs. Santa Rita Land & Mining Co., 148 *U. S.* 80, 37 *L. Ed.* 376.

In the Tameling case the Court, speaking by Mr. Justice Davis, said:

"No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action on each claim, reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum. It is, obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action."

The Surveyor General's report, therefore, is conclusive evidence of the title to the grant, and the recitals show that he found the grant to be the property of the claimants, viz: the heirs, successors and assigns of the original grantees. He did not find that the grant was made to the Town of Tome, but to Juan Barela and his companions; he did not find that the Town of Tome had had undisturbed possession of the entire grant for one hundred and seventeen years, without adverse claim of any character whatsoever, but that the heirs, successors and assigns of the original grantees had had such possession; he did not find that any title to the common lands remained in the preceding governments, to which the United States succeeded upon the cession of New Mexico, but found that no adverse claim of any character had been asserted against the petitioners or their predecessors in title, during the entire period from the date of the grant down to the time of his report. The confirmation, then, to the Town of Tome, could not be held to be a grant de novo to the Town of Tome, as has been decided by the lower court, since Congress by confirming the grant adopted the report and its recitals and findings and thereby disclaimed any title whatsoever in the common lands. To hold the contrary would be equivalent to sitting in judgment upon the recitals of the report and to reverse the action of the political department of the government which confirmed a perfect title, not an inchoate and incomplete town grant. To construe the Act of Congress without the Surveyor General's report would be in direct conflict with the decision in the Tameling case, and if the Act is con-

strued in conjunction with the Surveyor General's report, then the confirmation to the Town of Tome must be held to enure to the benefit of the real owners of the grant as declared by the report.

In its decision, however, the lower court has entirely overlooked the conclusive effect of the recitals in the Surveyor General's report, and has based its affirmance of the judgment of the district court upon cases which came before the Court of Private Land Claims, a court created by Congress with limited jurisdiction. Confirmation in all these cases was refused because it was held that the grants were inchoate and incomplete under the former governments, and made with a reservation of title in the common lands which passed to the United States upon the cession of New Mexico and Arizona, and that to grant lands of the United States did not lie within the jurisdiction of the Court of Private Land Claims under the Act of Congress, which created it. There was, therefore, no adjudication of the title by Congress such as is found in the case at bar, and the cases are not in point. If, however, the grants referred to by the Supreme Court of New Mexico had been confirmed to the claimants by Act of Congress based upon a report of the Surveyor General, such as was rendered in the case at bar, who could question the recitals upon which the confirmation was based? Under the authority of the Tameling case no court in the land could do so, nor change the purport or intention of the recitals by holding contrary to them.

In the lower court, counsel for the appellee contended that our position, if sustained, would result in reversing the Act of Congress, and cited the Tameling case in support of his contention that this was contrary to the law as enunciated by the Supreme Court. Counsel for appellee and the lower court as well have overlooked the true application of the facts in the case at bar to the statement of the Supreme Court in that case that "it is obviously not the duty of this court to sit in judgment upon either the recital of *matters of fact* by the Surveyor General, or his decision, declaring the validity of a grant." The appellants did not ask the lower court and are not now asking this court to sit in judgment upon the recitals of facts contained in the report, nor to set aside the Act of Congress, but instead are resting their case upon those re-

citals and asking that the confirmation to the Town of Tome be construed in the light of and according to their true intent and meaning. This the Court can and will do where a proper case for relief is shown.

United States vs. Maxwell Land Grant Co., 121 *U. S.* 325, 382, 30 *L. Ed.* 959.

In the above case in discussing the power of the Supreme Court to interpret confirmations by Acts of Congress, the Court said:

> "Certainly the power of the courts can go no further than to make a construction of what Congress intended to do by the Act which we have already considered, confirming that grant and others."

In conclusion, therefore, it only remains to reiterate that the appellants are asking not that the Act of Confirmation should be set aside, but that it be construed in the indisputable light of the findings in the report of the Surveyor General and that the petitioners for the grant, their heirs, successors and assigns, be held to be the equitable owners as tenants in common with the right to partition.

II.

THE FINDINGS OF THE SURVEYOR GENERAL WERE JUSTIFIED BY THE FACTS BEFORE HIM.

Taking up the documentary evidence which was before the Surveyor General at the time that he made his decision as to whom the Grant was made and as to its validity, we have first the original petition of the grantees for the Grant, of which the following is a copy:

"YEAR 1739.

> "New settlement of 'Nuestra Senora de la Concepcion de Tome Dominguez,' instituted and established by Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom of New Mexico, contained in four pages, including this:

Sir Senior Justice: All the undersigned appear before you, and all and jointly and each one for himself, state, and in order that his excellency the governor may be pleased to donate to them the land called Tome Dominguez, granted to those who first solicited the same, and who declined settling thereupon, we therefore ask that the land be granted to us; we therefore pray you to be pleased *(eaten by mice), at that time to *(eaten by mice), said settlers, we being disposed to settle upon the same within the time prescribed by law; we pray you to be pleased to give us the grant which you have caused to be returned, as you are aware that our petition is founded upon justice and necessity, our present condition being very limited, with scarcity of wood, pasture for our stock, and unable to extend our cultivation and raising of stock in this town of Albuquerque, on account of the many footpaths encroaching upon us, and not allowed to reap the benefit of what we raise, and, in a measure, not even our crops on account of the scarcity of water, and with most of us our lands are of little extent and much confined, etc. In view of all which we pray and request you to be pleased to grant our petition, by doing which we will receive grace with justice; and we swear in all form that it is not done in malice; we protest costs and whatever may be necessary.

Juan Barela, Joseh Salas, Juan Ballejos, Manuel Carrillo, Juan Montano, Domingo Cedillo, Matias Romero, Bernardo Ballejo, Gregorio Jaramillo, Francisco Sanchez, Pedro Romero, Phelipe Barela, Lugardo Ballejos, Augustin Gallegos, Alonzo Perea, Thomas Samora, Nicholas Garcia, Ignacio Baca, Salvador Manuel Francisco Silva, Francisco Rivera, Juan Antonio Zamora, Miguel Lucero, Joachim Sedillo, Simon Zamora, Zpritoval Gallegos, Juan Ballejos, grande, Jacinto Barela, Diego Gonzales.

In this town of San Phelipe de Albuquerque on the second day of the month of July, in the year one thousand seven hundred and thirty-nine, before me, Captain Juan Gonzales Baz, senior justice of said town and its jurisdiction, came the persons contained in the above petition, which by me seen, I state: That I cannot deliver to them

the grant asked for, as it has been returned by order of my governor, until I consult with his excellency, to whom this petition is referred, that seeing it, his excellency may determine whatever may be proper. I have so ordered and signed, acting by appointment, with two attending witnesses, in the absence of a public or royal notary, there being none in this kingdom. Date, ut supra.

JUAN GONZALES BAZ.

Witness: B. S. R. ALEJANDRO GONZALES,
SALVADOR MARTINEZ."

Page———, of Transcript of Record.

The Grant of the governor, Don Gaspar Domingo de Mendoza, the then governor and captain general of the province of New Mexico, and the act of possession, which was equivalent in the Spanish law to the livery of seizin at the common law, are as follows:

"Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom of New Mexico, for his majesty, having seen the above, I considered it as presented, and in view of the individuals therein contained, grant to them, in the name of his majesty, whom may God preserve, the land petitioned for, called the land of Tome Dominguez, for themselves, their successors, and whoever may have a right thereto under the conditions and circumstances required in such cases, and which is to be without prohibition to any one desiring to settle the same, holding and improving it during the time required by law. In view of which, I should order, and did order, that said senior justice or his lieutenant, whose duty it is, shall place them in possession of the afore-mentioned lands, giving in all cases to each one the portion he may be entitled to in order to avoid difficulties which may occur in the future. I have so provided, ordered, and signed, acting by appointment, with attending witness, in the absence of a royal or public notary, there being none other.

DON GASPAR DOMINGO MENDOZA.

ANTONIO DE HERRERA,
JOSEH TERRUS."

"Possession. In the new settlement of 'Nuestra Senora de la Concepcion de Thomi Dominguez,'' instituted and established by Don Gaspar Mendoza, actual governor and captain general of this kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty-nine, I Captain Juan Gonzales Baz, senior justice and war captain of the town of San Phelipe de Albuquerque, and the districts within its jurisdiction, by virtue of the decree issued and above provided by said governor, the royal possession ordered to be given being published and promulgated, and the parties concerned being together, I proceed to the above mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned of 'Nuestra Senora de la Concepcion de Thomi Dominguez,' whose titular feast they promised to observe and celebrate every year. And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition, which are as follows: on the west the Del Norte river, on the south the place commonly called 'Los Tres Alamos,' on the east the main ridge called Sandia, and on the north the point of the marsh at the hill called Tome Dominguez; at which principal boundaries I ordered them to perpetuate their existence with permanent landmarks, pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounced this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their land now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances; and for their greater quietude, peace, tranquility and harmony, I pro-

ceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows: To Francisco Sanchez, the general boundary on the west, the Del Norte river and (torn) arroyo or dry branch running out from said river, (torn) bounded by lands of Matias Romero, (torn) with them the lands of Ygnacio Baca; with them Lugardo Ballego; with these the lands of (torn) these are bounded by the lands of Bernardo Ballejo; (torn) lands of Juan Ballejo el grande; with these (torn) Gregorio Jaramillo; with these are bounded the lands of Josefa Gutierrez, with these a body of the lands of her brother Gregorio Gutirrez, (torn) the lands bounded by them; those of Miguel Lucero, (torn) with them those of Francisco de Silva; with these are those of Juan Ballejo the youngest; with these are bounded the lands of Manuel Carrillo and his sister, Jacinta Martin Carrillo, (torn) a body of the lands of Juan Barela, (torn) Ventura Romero, Domingo Sedillo, (torn) Salvador Manuel Marques, Manuel Carrillo, (torn) Jacinto Barela and Augustin Gallego, (torn) on the east, (torn) Cristobal Gallegos, Felipe Barela, (torn) Simon Zamora and Juan Montano, (torn) which are distributed on uncultivated ground in order that (torn) appear to be agreed upon (torn) possession was given, (torn) all having expressed themselves satisfied now and in the future, without failing to comply in one single instance with what had been ordered, nor in which said settlers should observe. And in order that it may so appear, I signed, acting by appointment, with attending witnesses, in the absence of a public and royal notary, there being none in this kingdom, on said day ut supra, etc., corrected.

FRANCISCO SANCHEZ,
JUAN GONZALES BAZ.

Witnesses:

ALEJANDRO GONZALES,
"YSIDOR SANCHEZ."

Page———, of Transcript of Record.

The three documents, above set forth, constitute the expediente of title upon which the Surveyor General was called upon to pass, and with the petition of the heirs, successors and assigns of the original grantees constituted the pleadings in the case before him. It has been laid down that the intention of the granted power as to title and quantity conveyed must be derived from an examination of all the documents composing the expediente of title.

Shepard vs. Harrison, 54 *Tex.*, 95.
United States vs. Morant, 123 *U. S.* 325; 31 *L. Ed.* 172.
United States vs. Larkin, 58 *U. S.* 557.

In Shepard vs. Harrison, supra, the Court said:

> "To these objections it was suffice to say that all the instruments which are referred to and embraced by the commissioners in the expediente form part of the title and may be referred to for the correction of errors and mistakes in other parts of it; that its legal effect must be determined by the whole and not from a single part."

Examining the petition, therefore, we find that the petitioners asked the governor to donate to them the lands called "Tome Dominguez," and at the close we find "we therefore ask that the land be granted to us." It is evident from the petition that the tract known as Tome Dominguez was a specific tract of land, whose boundaries were known, and which probably had been previously granted, but the grant forfeited. The governor allowed the petition and granted to them the land petitioned for, for themselves and their successors. The grant appears to have been conditioned upon their holding and improving the land during the time required by law and without prohibition to any one desiring to settle the same, and directs the proper official to place them in the possession of the afore-mentioned lands, giving in all cases to each one the portion he may be entitled to in order to avoid difficulty which may occur in the future. The condition that the grant should be made subject to the right of others to settle upon the same was a condition subsequent and seems to have been made for the purpose of permitting other settlers to take advantage of the Grant. But it will not be

disputed that if the original grantees prohibited such settlement no one could avoid the Grant for such violations of its conditions except the granting power.

Fremont vs. United States, 58 *U. S.* 542.
United States vs. Arredondo, et. al., 31 *U. S.* 718.

In view of the words of the petition before the Surveyor General, it is evident that the grantees, their heirs, successors and assigns, had never considered that any one had a right to enter thereon except themselves, and that their claim to title to the entire tract had not been disputed by either Spain or Mexico, all of which the Surveyor General found to be true. No later distribution of the common lands appear to have been made under the sanction of either the Spanish or Mexican governments. The juridical act of possession is very material in that it supports and explains the reasons why the petitioners before the Surveyor General and their predecessors in title in the grant, made claim to an absolute grant in fee simple in the original grantees, and why they alleged that they had held exclusive possession of the land ever since it was granted. The recitals of the alcalde in the act of possession which are most significant, state that the officer gave them possession of said lands unconditionally, and that after proceeding to mark the boundaries, he pointed out to them also "as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be used without any dispute with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of which has been ordered, I pronounced this royal possession a sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will," and the officer then proceeded to mark out their individual holdings in order, as he states, to promote peace, tranquility and harmony amongst the settlers.

It is apparent that the petitioners were placed in the possession of the whole tract, and that the allotments were made simply to prevent squabbles over the partition of the agricultural lands of the Grant. The officer evidently construed the Grant to be absolute or otherwise he would not have given

them unconditional possession of the entire Grant as he plainly did from the wording of his act of possession.

The act of possession in the civil law as applied by the Spanish government was essentially similar to the livery of the seizin at the common law, and transferred, as did the latter ceremony, what was equivalent to a freehold estate. The act of possession passed formally from the crown to grantees all the right, title and interest of the Spanish Crown, unless there was a reservation of title in the Crown. No such reservation appears in the act of possession, and it is evident from the wording of the petition to the Surveyor General that the grantees, their heirs and assigns, had always considered the grant as one absolute in the grantees. With reference to the effect of the act of possession, Mr. Justice Field, speaking for the Court, said in the case of United States vs. Pio Pico, 72 U. S. 536, 18 L. Ed. 695:

> "Were there any doubt of the intention of the governor to cede all the land contained within the boundaries designated by him, it would be removed by the juridical possession delivered to the grantees. This proceeding involved an ascertainment of the boundaries of the lands granted by the appropriate officers of the government, especially designated for that purpose and has all the force and efficacy of a judicial determination. It bound the former government and is equally binding upon the officers of our government."

And again in Graham vs. United States, 4 Wall. 259, 18 L. Ed. 334, the same learned Judge said:

> "By this proceeding, called in the language of the country the delivery of juridical possession, the land granted was separated from the public domain and what was previously a grant of quantity, became a grant of a specific tract."

Whether or not the alcalde had the power to place the grantees in possession of the entire tract cannot at this date be questioned.

Strother vs. Lucas, 12 *Pet.* 138, 8 *L. Ed.* 1147.

In the above case, Mr. Chief Justice Marshall said:

> "No principle can be better established by the authority of this Court than that the acts of an officer, to whom a public duty is assigned by his king, within the sphere of that duty, are prima facie taken to be within his power. The principles upon which it rests are believed to be too deeply founded in law and reason to be successfully assailed. He who would controvert a grant executed by the lawful authority with all the solemnity as required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud Where the act done is contrary to the written order of the king, produced at trial without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the king and his officers, though not to his subjects, and courts ought to require very full proof that he has transcended his authority before they so determine it."

The weight which has always been placed upon the act of possession in construing grants is indicated by the opening statement of Mr. Justice Fuller in delivering the opinion in Rio Arriba Land & Cattle Company vs. United States, 167 U. S. 298, 42 L. Ed. 175, which is as follows:

> "Assuming, but without in any manner deciding that Gov. Alencaster had full power to make the grant in any quantity and in any manner he saw proper, we think it clear that he did not and did not intend to make a grant of nearly half a million of acres to the original applicants, in common, and that the alcalde did not so understand it, and did not attempt to deliver juridical possession of such a tract, but only of the various allotments that were made to petitioners in severalty."

This is one of the cases which was relied upon by the lower court in sustaining the opinion of that court in the case, but if the act of possession is read in the above case it will be seen that the Chief Justice relied largely upon the fact that the

act did not indicate an intention on the part of the alcalde to deliver juridical possession of the entire tract, whereas in the base at bar, it is evident from the alcalde's recitals in the act of possession that he did intend to give possession of the entire tract, and that the allotments were made by him for the single purpose of promoting harmony amongst the settlers and preventing trouble amongst them by any subsequent unjust partition of the agricultural lands. This construction of the act of possession seems to have been the same which was placed upon it as regards the character of the grant to the settlers, by both the Spanish and Mexican governments, as is indicated by the recital in the petition to the Surveyor General to the effect that the possession and property right of the grantees, and their successors and their heirs, successors and assigns, had never been interfered with by any person whatsoever. Certainly the record does not disclose that either Spain or Mexico, or any one else acting under their authority, had ever attempted to assert any sovereign powers over the land, or had ever attempted to re-grant or otherwise dispose of any of the common lands of the grant, and in fact there is every presumption to the contrary, as is indicated by the findings contained in the Surveyor General's report. In the case of Malarin vs. United States, 1 Wall. 282, 17 L. Ed 594, Mr. Justice Field, in speaking of the effect of the act of possession, made the following statement:

> "The solemnities attending this official delivery of possession were well calculated to make an impression upon the minds of the spectators, and to preserve the recollection of the act. The ownership, extent and general location of the land were thus matters brought well within the knowledge of the neighborhood and were no doubt afterwards the subjects of frequent reference among adjoining proprietors."

The Pena case, in which appeared the expediente of title, cited by the Supreme Court of the Territory of New Mexico, in its decision in the case at bar, was decided by the Supreme Court of the United States, December 18, 1899, Mr. Justice Brewer delivering the opinion of the court. It should be remembered first that this Grant was made in the year 1836 by

officials of the Mexican government under the Mexican colonization law. In its opinion the Supreme Court again showed that the intention of the Governor should be controlled by a consideration of the recitals in the act of possession, and the following comments upon this feature of the Pena case appears in the opinion. (United States vs. Pena, et. al., 175 U. S. 500, 506; 44 L. Ed., page 253):

> "But whatever doubts might arise from an examination of the governor's order, if that was the only document to be considered, the report of the alcalde's proceedings shows affirmatively that he distributed the lands in the presence of the parties interested, "giving to each one 150 varas in a direct line." He evidently understood that he was to distribute this land among certain individuals. He proceeded to do so and gave juridical possession accordingly. Whatever may be thought of his interpretation of the governor's order, the only juridical posession which is shown to have been given is juridical possession in severalty to the parties named in the list. The original petitioners were never put, so far as the record shows, in juridical possession of the entire tract, and such a grant, if it was so intended, was never made effective by any juridical possession. We think it more in consonance with justice and equity to hold, not that the grant was of an entire tract which never became operative because of a failure to give juridical possession, but that the alcalde rightfully understood it as a grant in severalty, and giving juridical possession vested in the grantees the tracts of which they were so placed in possession."

It will be noticed that the Court said that the original petitioners were never put in juridical possession of the entire tract, and as a result the grant was never made effective by any juridical possession. In this lies the difference between the Pena case and the case at bar, since it appears definitely from the juridical act of possession in the Tome case that the petitioners were placed in possession of the entire tract, and this intention is conveyed by words which are unmistakable in their meaning as has already been indicated in this brief. If the other cases cited by the Supreme Court in sup-

port of its decision are taken and analyzed in the same manner, it will be found that exactly this difference occurs in each case as between the grant cited and the Tome Grant.

There is further evidence of the fact that the heirs and assigns of the original grantees have always considered that they were tenants in common, contained in chapter 76, laws of New Mexico, approved January 6, 1874, entitled, "An Act and Preamble, Special, for Precinct Number Three of the County of Valencia," which preamble is as follows:

> "WHEREAS on the eastern side of precinct number three of said county there exists several springs of water, which are situated within the limits of the grant given by the government of Spain to the first settlers of the town of Tome; and
>
> WHEREAS, in the transfer of lands granted and conveyed by the grantees to whom such grant was given, making a great number of owners to whom the lands granted now belong by right, by virtue of this they are all owners in common and entitled to the water of said springs, which for many years past, have been preserved and kept clean in common by said owners; and
>
> WHEREAS there now exists a great negligence and abandonment in cleaning the same in order that they may be of use to the owners of said springs, they being beneficial and profitable to them; Therefore,"

It is questionable, indeed, if the grantees ever saw, and even if they did, that they read the granting words of Governor Mendoza with any idea of the legal meaning of the words, but they did know that the manual transfer of the lands to them by the officer of the Crown who placed them in possession was unconditional and absolute, and they, their heirs and assigns, based their claim of title upon that act, which, taken alone, would furnish color of title at least.

If the history of the country at the date of the Tome Grant is considered, it will be remembered that the year in which the Tome Grant was made was hardly fifty years after the Pueblo rebellion, and that the country was still in great fear of further Indian uprisings. It was the policy of the officials of Spain, then in New Mexico, to push colonization farther

and farther beyond the then frontiers of New Mexico, and grants of lands, sometimes in large quantities, were given to encourage such settlements. Governor Mendoza, in the year following the granting to the settlers of the Sitio de Tome de Dominguez, made another grant to petitioners for a tract of land not far from the Tome Dominguez, called the "Belen Grant." The wording of this grant and of the act of possession are particularly significant and shed some light upon the intention of the governor in the Tome Grant and that of the alcalde who placed the petitioners in possession, and it is therefore incorporated herein as follows:

"Royal Grant. In the town of Santa Fe, on the fifteenth day of November, one thousand seven hundred and forty, I, the lieutenant, colonel, governor and captain general of this kingdom of New Mexico, Don Domingo Gaspar de Mendoza, having seen the present petition made by the persons therein referred to, should order, and did order, that a grant be made to them of the tract they ask for, in the name of the king, our sovereign, (whom may God preserve), in order that they may settle, cultivate and improve the same for the benefit of themselves, their children, heirs, and successors who may have a better right thereto, without injury to any third party, as they promise in their said petition. Therefore, I order and direct the senior justice of the town of Albuquerque, Don Nicolas de Chaves, to give them the possession referred to, under the condition and terms required in such cases; and there being no doubt of the existence of other royal grants in the vicinity, the deeds and titles of those who adjoin said land are required to be presented for the fulfillment of this new grant, in order that it may be divided with more propriety, for the purpose of avoiding suits and difficulties at the present time as well as in the future, I deem it proper to conform to the forms which are provided. I have so provided, ordered and signed, with my attending witnesses, acting by appointment in the absence of a royal notary, there being none and on common paper there being none other in this kingdom.

DON GASPAR DOMINGO DE MENDOZA.

Antonio de Herrera.

Jose Terrus.

It is noted in my book of government, on file in the archives of this capitol, on the reverse of page 68.

MENDOZA.

Santa Fe, January 25, 1742.

At this place of our Lady of Belen, jurisdiction of the town of Albuquerque, on the ninth day of the month of December, of the year one thousand seven hundred and forty, I, Captain Don Nicolas Duran y Chaves, senior justice and war captain of said town and jurisdiction, by virtue of the decree of Lieutenant Colonel Don Gaspar Domingo de Mendoza, governor and captain general of this kingdom, promulgated on the fifteenth of November last past, wherein I am directed to proceed to give royal possession to Captain Diego de Torres, as the representative of all the persons mentioned and signed in the foregoing petition; according to the tenor of their petition, a grant is made to them in the name of his majesty, which decree was published to those adjoining said lands by my order, and there being no objection made to the petition, I proceeded to give possession. Said lands being bounded on the north by those of Captain don Nicolas Duran y Chaves; on the south, fronting the foundation of the house of Phelipe Romero; on the west, the Puerco river; that portion on the opposite side of the river, with the boundary of the settlers of the Pure and Limpid Conception, and on the east by the Sandia mountains, and on the south by the ruins and walls of the house of the aforesaid Phelipe Romero; and having examined said boundaries with three attending and instrumental witnesses, according to law, I took the aforesaid Torres by the hand and walked with him over the lands, and he cried in a loud voice, pulled up grass, threw stones, and gave other manifestations which are made and provided in such cases, receiving this possession in the name of his Majesty, quietly and peaceably, with the same boundaries contained in his petition; whereon I directed perpetual landmarks to be established, giving him said lands free and with general pastures, water, watering places, timber, uses and customs, in order that he, his children, heirs, and successors, may enjoy the same without opposition, and this royal possession to be evidence of a suffi-

cient title, and by virtue of which he shall enjoy the same as aforestated, and in order that it may so appear, I placed it on record. Bernabi Baca, Ballazar Baca, and those in my attendance being instrumental witnesses, who signed with me as acting judge, on the present common paper, there being none stamped in these parts. Before me, and as acting judge.

NICOLAS DE CHAVES.

Attending:

Jose Miguel Alvarez de Castillo,
Guillermo Saavedra."

The above grant was made upon the petition of thirty-three persons, who asked for an absolute grant of the lands described in their petition, and the granting words conveyed as absolute a title as explicit words could convey. There is no limitation of any character, and the intention is plainly shown to convey the entire tract. The act of possession is equally conclusive to support this statement. Only one of the settlers was placed in possession, but he took possession for all, and the alcalde recites in the act of possession that the land was given to him, his children, heirs and successors without any qualifying words, as in the Tome case. It is evident that the partition of the agricultural lands was to be made by agreement of the settlers themselves. The above grant and the act of possession constitute as complete an investiture of a fee simple title in the grantees as correct and apt legal phraseology could possibly convey. This grant having been made only one year after the grant to the settlers on the Sitio de Tome de Dominguez, it is safe to conclude that the intention to grant the land absolutely to the petitioners was equally true in the Tome case as in the Belen case.

From the petition to the Surveyor General and the evidence in the case before him, bearing upon the question of the character of the title claimed, it is evident that it was believed that the grant was originally made in fee to the twenty-nine petitioners, and that they had held possession of the tract under this claim of title for one hundred and seventeen years. Whatever, therefore, the opinion of the lower court was as to the title of the claimants of the grant, it is plain that the finding of the Surveyor General could be interpreted as meaning either that the original grant was a grant in fee to

the grantees, or that the long standing undisturbed possession of the grantees, their heirs and assigns, had established for them a good title by prescription as against Spain, which, after the acquisition of the country by Mexico, had been successfully maintained under that government.

Prescription against the Crown was recognized by the laws of Spain. As was said by Mr. Juctice Holmes, speaking for the Court in the case of Carino vs. Insular Government of the Philippine Islands, 212 U. S., page 445, 53 L. Ed. 594-598:

> "As prescription even against crown lands was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippine Islands in regard to lands over which Spain had a paper sovereignty."

No doubt the above was based upon the ordinance found in Novisima Recopilacion, Book 11, Tit. 8, page 195, which, translated, is as follows:

> "Of the time necessary to prescribe, as respects the lordship of places, and its civil and criminal jurisdiction, with the exception of the supreme, and of the dues and tributes belonging to the king.
>
> Seeing that some persons, in our dominions, hold and possess some cities, towns, and places, and civil and criminal jurisdictions, without having a title for the same from us, nor from the kings, our predecessors; and it has been doubted whether the above mentioned can be acquired from us and our crown through time, (can prescribe), we ordain and order, that possession immemorial, when it is proved how and when, and with the circumstances required by the law of Toledo, (which is law 1, title 17, lib. 10), is sufficient to prescribe against us, and our successors, as regards cities, towns and places, and civil and criminal jurisdictions, and anything growing out of these, and everything belonging to that lordship and jurisdiction annexed: provided always, that the time of the aforesaid prescription be not interrupted or broken by us, or by our order, or of others in our name, naturally or civilly. But the supreme jurisdiction, civil or criminal, which kings possess by greatness and royal

power, which is to act and to enforce where other lords and judges fall off. We declare that this cannot be obtained, nor prescribe through said time, nor any other; and, in the same way, when the laws say that things of the kingdom cannot be obtained through time, it is understood the dues and tributes to us belonging. (R. lib. 5 tit. 15, ley. 1). White on "A New Collection of Laws, Charters and Local Ordinances," etc., Vol. 2, Pages 736-737.

The above provides for the prescription as against the crown of cities, towns and places on the part of persons in the Spanish kingdom, holding such places from immemorial possession.

The allegations in the petition show that during the Spanish dominion over New Mexico the grantees, their heirs and successors, claimed the grant called the "Sitio de Tome Dominguez" from the date of the grant, which was 1739, a matter of about eighty years before the acquisition of the country by Mexico. This period would be sufficient to warrant the Surveyor General in holding the title good as against Spain under the theory that in view of the fact that there had been no disturbance of their possession, their claim, under the provisions of the above law, had ripened to a good title against the Crown by prescription. Certainly the allegations in the petition are sufficient to support a title by prescription, and the Surveyor General found the allegations to be true. In view of those findings and the adoption of the report by the confirmation act of Congress, no court in accordance with the authority cited in the preceding section of this argument, can question it. The conclusion, therefore, is that at the date of the Treaty of Guadalupe Hidalgo, the title to the grant had vested absolutely as against any other claimants whatsoever, in the heirs, successors and assigns of the original grantees, and that they were tenants in common of the common lands with the right to partition, and that the Surveyor General's report establishes this fact beyond question at this date.

III.

The Confirmation Should Be Construed as the Confirmation of the Title of the Claimants, the Heirs, Successors and Assigns of the Grantees.

Pursuing the above argument, it is premised that there could be no title in the United States which could by any act of Congress defeat the equities of the heirs, successors and assigns of the grantees. The change in sovereignty did not alter the title nor the rights of the real parties in interest, and the act of confirmation could not destroy the title of the claimants which was complete and perfect at the date of the Treaty of Guadalupe Hidalgo.

Ainsa vs. N. Mex. & A. R. Co., 175 *U. S.* 76, 79, 44 *L. Ed.* 78, 80, *and cases cited.*

United States vs. Percheman, 7 *Pet.* 86, 87, 8 *L. Ed.* 617, 618.

Tremier vs. Stewart, 101 *U. S.* 797-910, 25 *L. Ed.* 1021-1024.

In Tremier vs. Stewart, supra, it is laid down as indisputable that "if the title of the original donee was complete when the province was ceded to the United States, it is the superior title and is protected by the Treaty of Cession." So in the case at bar the title to the grant as claimed by the petitioners in the petition to the Surveyor General was complete and perfect in the petitioners as the heirs and assigns of the original grantees, no confirmation of the grant to the Town of Tome could be construed to divest them of that title.

In United States vs. Chaves, 159 U. S. 452, the grant passed upon was one to which the title papers had been lost and was originally made under the colonization laws of Mexico, passed August 18, 1824, to about sixty settlers. The Court of Private Land Claims found, amongst other matters that the grant to the settlers "was complete and perfect at the date when the United States acquired sovereignty in the Territory of New Mexico,"—"that the said complainants are in possession of the said lands embraced within the calls of the grant, and claim the same; that they and their ancestors and predecessors in right have been in the possession of the same since the issuance of the grant by the Mexican government, and that complainants have such a claim and interest in the land as gives them a right to apply to the court for a confirmation of their title" and concluded by confirming the grant to the claimants, their heirs, successors and assigns. The Supreme Court affirmed this decree of the Court of Private Land Claims, notwithstanding that the grant was ap-

parently made to settle the town of Cubero which was shown to be on the grant and the original expediente of title was lost, on the ground that the proof of long standing possession of the lands in the grant by the claimants was sufficient to support the findings of the court.

In the case at bar the grant was made nearly one hundred years prior to the Cubero grant, and the presumption of title and ownership in the claimants was, when submitted to the Surveyor General, even stronger and his findings in the premises were thus even more substantially supported by the facts before him than were the findings of the Court of Private Claims. If the Cubero grant could be found to be complete and perfect in the claimants at the time of the Treaty of Guadalupe Hidalgo, then the Tome grant was equally so and the confirmation should have been made to the claimants and not to the Town of Tome.

If the above conclusion is logically pursued, then it is the duty of the courts to so construe the act of confirmation as to give to the heirs and the assigns of the grantees their right, as tenants in common, to partition the common lands of the Grant.

The directions and instructions of the Secretary of the Interior conveyed to the Surveyor General in accordance with the provisions of the law, creating the latter office, will explain the recommendation of that official that the grant be confirmed to the Town of Tome, notwithstanding his finding of facts that the grant was made to the original grantees and that they, their heirs, successors and assigns, had held undisturbed possession of the same for a period of one hundred and seventeen years. The instructions are as follows:

> "In the case of any town lot, farm lot, or pasture lots, held under a grant from any corporation or town, to which lands may be granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, or in the case of any city, town or village lot, which city, town or village, at the time possession was taken of New Mexico by the authorities of the United States, the claim to the same may be presented by the corporate authorities of the said town, or where the land on which the said city, town or village was originally granted to an individual, the claim may be

presented by, or in the name of, such individual, and the fact, being proved to you of the existence of such city, town or village, at the period when the United States took possession, may be considered by you as prima facie evidence of a grant to such corporation, or to the individuals under whom the lot holders claim; and where any city, town or village, shall be in existence at the passage of the Act of 22nd, July, 1854, the claim for the land embraced within the limits of the same, may be made and proved up before you by the corporate authority of the said city, town or village. Such is the principle sanctioned by the Act of 3rd March, 1851, for the adjudication of Spanish and Mexican claims in California and I think its application to, and adoption proper in regard to claims in New Mexico."

Instructions Secy. of Int. to Sur. Gen'l. of N. M., dated Aug. 21, 1854, as found on page 10, Santa Fe office copy, on file in the office of the Surveyor General, Santa Fe, New Mexico.

The Surveyor General, without careful examination of his instructions, recommended confirmation to the Town of Tome simply because the existence of such a town was proven at the time the United States took possession, overlooking the fact that the grant was not made to a town nor to any corporation, but to individuals, and that the application for confirmation before him was not made by a corporation, a city or a town, but by individuals claiming to be the heirs, successors and assigns of the original grantees, to whom, as they alleged, the grant was made in fee. His conclusion, then, that the grant was to the Town of Tome and should be so confirmed, is obviously, in view of his findings, an erroneous conclusion of law, which courts of equity will always correct by such a construction of the law as will prevent injustice from resulting.

Moore vs. Robbins, 96 *U. S.* 535, 24 *L. Ed.* 851.
Grenameyer vs. Coate, 212 *U. S.* 434.

It has been repeatedly held that confirmation of Spanish and Mexican grants are merely recognitions of the claim and inure to those showing the best right thereto by a resort to

the ordinary remedies at law or in equity, according to the nature of the claim.

Bissell vs. Penrose, 8 *How* 317.
Hogan vs. Page, 2 *Wall* 607 (69 *U. S.* 605), 17 *L. Ed.* 855.
Carpenter vs. Rannells, 86 *U. S.* 138, 22 *L. Ed.* 79, 80.
Watterson vs. Bennett, 19 *La. Ann.* 250.
McDonald vs. McCoy, 53 *Pac.* 421, 121 *Cal.* 55.
Rachael vs. Irwin, 8 *Mart.* (*N. S.*) 331 (*La.*).
Connoyer vs. Schaeffer, 89 *U. S.* 837, 22 *L. Ed.* 837.

In the case of Connoyer vs. Schaeffer, supra, it was laid down as established law that where the claimant presented evidence of a derivative title as well as the expediente of title and the commissioners under the Act of Congress of July 4, 1836, based their decision upon both, the confirmation operated as a Grant to the claimants notwithstanding the fact that the claimants named did not appear in the Act of Confirmation. This case arose upon an action in ejectment to try title to a lot of land in the city of St. Louis, the claim for which had been presented to the Board of Commissioners under the Act of Congress of July 4, 1836, for confirmation. The Board recommended confirmation and the Grant was confirmed to a widow by the name of Dodier, to whom the concession was originally made, or her legal representatives, by Act of Congress of July 4, 1836, based upon the report of the commissioners. It seems that the claimant was one Louis Labeaume, who claimed title by conveyance from the heirs of the grantees and the Court sustained the confirmation as one to the claimant Labeaume, and not as one to the widow Dodier, or her legal representatives. In the course of the opinion delivered by Mr. Justice Davis, the Court said:

> "Two classes of claims were presented to the commissioners—one where the claimant exhibited with his claim evidence of a derivative title from the concedee, the other where he only produced the original concession without attempting to show his connection with it.
>
> In the latter class of cases the claim, if confirmed, has been held to have the effect of a confirmation to the legal representatives of the person to whom the original concession was made. This ruling proceeds upon the theory

that the commissioners passed upon nothing but the merits of the original concession, having no opportunity to pass upon the validity of anything else. Of this class, where no evidences of derivative title at all were filed with the concession, is the case of Hogan vs. Page, reported in 22 Mo. 55, and 32 Mo. 68, 2 Wall. 605, 17 L. Ed. 854.

But where the claimant presented before the Board, besides the original title, evidences of derivative title, it has been held that the commissioners decided upon both, and that the confirmation operated as a grant to the claimant, although his name was omitted in the form of confirmation. This was expressly ruled in Bissell vs. Penrose, 8 How., 317. The claim there was confirmed to Benito, Antoine, Hypolite, Joseph and Pierre Vasquez, or their legal representatives, according to the concession. Rudolph Tillier presented the claim for confirmation and produced the concession, with written evidence of his title, which would appear to have been imperfect. It was argued there, as here, that the Act of 1836 confirms only the Spanish concession in the abstract, but the court held otherwise, and decided that the title was confirmed to Tillier, the assignee, as claimant. Besides the general reasoning on which this opinion is based the decision in Strother vs. Lucas, 6 Pet. 772; 12 Pet. 458, and the usuages of the land office are cited in support of it.

Shortly after the decision in Bissell vs. Penrose, the case of Boone vs. Moore, 14 Mo. 420, arose in Missouri. The confirmation in that case was to David Cole, or his legal representatives. The claim was filed by Jesse Richardson, who produced before the old Board his derivative title papers. The Supreme Court of Missouri held that the confirmation was to Richardson, and not to the legal representatives of Cole, on the authority of Bissell vs. Penrose, and this, too, while evidently doubting the propriety of that decision. The same point was again presented to the Supreme Court of Missouri in Carpenter vs. Rannells, 45 Mo. 584, with the same result. The record in that case shows that James Bankson, as assignee of John Butler, under an executory contract, claimed the land, and produced to the Board the evidence

upon which a confirmation was granted. The judgment of confirmation, however, was to John Butler, or his legal representatives, but the court held, on the authority of Bissell vs. Penrose and Boone vs. Moore, that the legal effect of this confirmation was to vest the title in Bankson. The principles in this case are examined and adhered to in the case of the present plaintiffs against Labeaume's heirs, reported in 45 Missouri, 39.

The case of Carpenter vs. Rannells, ante, 77, was brought to this court, and it was held, substantially, that Bankson, having presented the claim and filed his paper title with it, the confirmation inured to him, and that no other representative of Butler, whether hereditary or by contract, had any right, legal or equitable, to the premises in controversy."

The above excerpt is printed in full for the reason that the Court reviewed the cases involving this question which formerly had been passed upon by the Supreme Court. In the case at bar, the Surveyor General who passed upon the claim of the petitioners for the Tome Grant was in no different position than the Board of Commissioners in the above case. The claimants of the Tome Grant claimed as heirs, successors and assigns of the original grantees to whom, they alleged, the grant was made in fee simple. This, therefore, is a claim which falls within the first of the two classes enumerated in the above opinion of the Court in the Connoyer case. It must be presumed that not only was the expediente of title presented, but also proof of a derivative title from the grantees submitted since the Surveyor General found that the heirs successors and assigns of the grantees, to-wit, the claimants in the petition, had been in possession of the grant ever since it was made. It falls, therefore, within the purview of the above decision of the Supreme Court, and the cases cited, wherein the rule is laid down that confirmation by Congress in such cases must be construed to inure to the claimants, and not to the confirmee.

Equities prior to the patent may be examined.

Carpenter vs. Montgomery, 13 *Wall.* 480, 20 *L. Ed.* 699.
Salmon vs. Symonds, 30 *Cal.*, 301.
Catron vs. Laughlin, 11 *N. Mex.* 604.

And courts of equity will hold the patentee as trustee for those who have equitable interests in the lands to the full extent of their interests.

Carpenter vs. Montgomery, supra.
Townsend vs. Greeley, 5 *Wall.* 326, 18 *L. Ed.* 547.
Bernier vs. Bernier, 147 *U. S.* 247.

Since a suit in partition, under the New Mexico statutes, is a cause in chancery, as shown by the law under which this cause was brought as set forth in the first section of this brief, the District Court in which this case was filed, sitting as a court of equity, could inquire into and determine all questions involving the rights of the parties in this suit, in order to give complete relief. The court could, therefore, in the exercise of its chancery powers, have declared the trust in the Town of Tome and could have proceeded to have partitioned the equitable estate of the tenants in common. Such an interest is subject to partition since it is not necessary that the plaintiffs to an action for partition should have the legal estate.

Watson vs. Sutro, 86 *Cal.* 507; 24 *Pac.* 172.
Gates vs. Salmon, 36 *Cal.* 593.
Luco vs. de Toro, 91 *Cal.* 405; 27 *Pac.* 1082.
Royston vs. Miller (*C. C.*) 76 *Fed.* 50.
Stein vs. McGrath, 30 *So.* (*Ala.*) 792.

IV.

The Contention of the Defendant, the Town of Tome, Contained in the Answer, That the Incorporation of the Grant Under the Provisions of Chapter 54, Laws of 1897, of the Territory of New Mexico, Operated to Vest the Legal and Equitable Title to the Grant in Said Corporation, Is Not Tenable.

By the provisions of this act (Sec. 2149 and 2160, Compiled Laws of 1897), two-thirds of the owners of the Grant could incorporate even though against the will of the balance of the owners; and the corporation so organized could sell, or otherwise dispose of the Grant, regardless of the wishes of the parties in interest in the Grant, unless a majority opposed the sale. (Sections 2163, 2166 and 2176). In other words,

without judicial action of any nature, the heirs and assigns of the original grantees could be deprived of their inherited interest in the common lands against their wishes and without an opportunity to be heard in their own defense. Such a statute is obviously iniquitous and in violation of elementary principles of law and the constitution. If the interpretation of the operation of this statute as contained in the answer of the defendant, the Town of Tome, should be sustained, it would deprive the co-tenants, as between themselves, of the right of having their interest determined by a Court of competent jurisdiction and take away from them, without due process of law, recourse to partition proceedings, which is the right of every co-tenant.

To deprive a tenant in common of his rights to partition there must be a disseizin by actual ouster. In the absence of such actual ouster the ordinary rule applicable to tenants in common, that the possession of one is the possession of all, prevails.

The question of whether or not there was an actual ouster amounting to a disseizin by the pretended corporation is a question of fact put in issue by the specific denials contained in the reply. It is evident that unless all the tenants in common joined in the alleged incorporation, then the pretended corporation held, if it had any title, as a tenant in common with those who did not join in the suit which is alleged to have resulted in the corporation.

The mere incorporation of the company, therefore, for the preceding reasons cannot, of itself, constitute an ouster and there is no proof before this court of any act of disseizin which, as a matter of law, could bar the tenants in common of their right to partition. This phase of the questions raised by the defendants must necessarily be dismissed from consideration at this time, there being no proof of disseizin before this court such as would bar the action.

However, it is our contention that the defense that the pretended incorporation could deprive the tenants in common from their right to partition has no standing as a matter of law under any circumstances. It seems to us that the statute under which the grant was incorporated had no other object in view than to effect a method by which the management of grants could be concentrated in a few hands so that the property could be better conserved for the benefit of all the ten-

ants in common. It did not contemplate nor intend that it should be used as an instrument to deprive the individual tenant in common of any of his rights, or of his property.

It is interesting to note that very similar conditions have existed in other sections of this country, and that the courts have held that the method of managing such estates did not deprive the tenants in common of their right to partition.

> "A very considerable portion of the New England States was originally held under titles acquired by grants made by the colonial legislatures of a township or other large tract of land to a number of proprietors. The estate thereby created was no doubt a tenancy in common. But these grantees or settlers managed their common property by assembling and passing votes and orders in regard thereto. In that manner, they admitted new members, upon payment of certain sums, and divided the lands as they thought right among those entitled. By force of custom and of general regulations for their government, these proprietaries seemed to have acquired and exercised in regard to their property the general powers of corporate bodies. But the members, as between themselves, retained some of the rights of tenants in common. Each could compel a partition by legal process."
>
> *Freeman on Cotenancy, 2nd Ed.* 99.

In a suit to partition the common lands of the island of Nantucket, where title to the lands were deraigned from two patents from the Governor of the colony of New York, the patent reading:

> "Now, for confirmation, etc., I do hereby grant, ratify and confirm, unto Tristram Coffin, senior and Thomas Macy, as patentees, for and in behalf of themselves and their associates, the inhabitants, freeholders, their heirs, successors, and assigns, the said island called Nantucket Island," * * * * "and the said island and premises shall be held, deemed, reputed, taken and be, an entire enfranchised township, manor and place of itself; and shall always, and from time to time, and at all times hereafter,

have and enjoy like and equal privileges with any town, enfranchised place or manor, within this government."

The respondents alleged:

"That the proprietors of the common and undivided lands on the Island of Nantucket are, and, from the time whereof the memory of man is not to the contrary, have been, an ancient body politic and corporate," * * * * "and, as a body politic and corporate, are, and have been, during all that time, invested with the exclusive right, at their corporate meetings, to divide, dispose, cultivate, feed, manage and improve, the common and undivided lands aforesaid in such manner as, in their corporate capacity, they should deem just and equitable; and the said respondents further say that, during all that time, they have, as a body politic and corporate, as aforesaid, at their corporate meetings, duly convened, exercised the exclusive right of dividing, disposing, cultivating, feeding, managing, and improving the common and undivided lands aforesaid, in such manner as by them in their said corporate capacity hath been deemed just and equitable; and they further say, that it is not, and that during all the time aforesaid it hath not been, competent for any one or more members of said corporation to have any proportion of the property of said corporation set off or divided to him or them by petition for partition as aforesaid."

The Court said:

"Neither of these pleas in bar traverse the tenancy in common. Such prescription as it attempted to be set up by them is against the law of the land, and cannot be supported. It is essential to an estate in common to be subject to partition. The pleas in bar are clearly bad and insufficient."

The Court further said:

"The grant of these lands was in no essential point different from the usual grants to a number of individuals collectively, which always constitute the grantees

a proprietary or quasi corporation. The grant was to the individual freeholders, not to the corporation." * * * * "The peculiar modes of occupying and managing lands by tenants in common cannot be said to take away their right to partition." * * * * "The owners of the land are then tenants in common, and as such they are entitled to partition."

Commissioners were appointed by the Court to make the partition prayed for.

Richard Mitchell, et. al., vs. Sylvanus Starback, et. al., 10 *Mass.* 5.

V.

CONCLUSION.

To summarize, the contentions of this brief are:

First, That the District Court was called upon as a court of equity to pass upon the status of all the parties to the suit and to determine the same, as well as to decree a partition of the common estate of the tenants in common.

Second, That the Court was not called upon to pass upon an adjudication by Congress or to set such an adjudication aside, but to so construe the Act of Confirmation as to make effective the real intent of the Surveyor General as shown by his report, and to make it possible for the heirs, successors and assigns of the original grantees to obtain their rights, as tenants in common, in partition proceedings.

Third, The terms of the grant, as shown by the expediente of title, the petition to the Surveyor General, his report, and all the matter introduced in plaintiff's brief to show the manifest error in his recommendation of confirmation to the Town of Tome, are not submitted for the purpose of calling into question the legal title to the Town of Tome as confirmee, but as constituting undeniable ground in equity for the intervention of the court to so construe the Act of Confirmation as to render justice and equity to all the parties interested.

Fourth, The question of title by adverse possession in the alleged corporation, the Town of Tome, cannot be determined until the evidence is taken and actual disseizin by said corporation of the tenants in common be conclusively shown by the evidence.

If, now, this court affirms the decision below and declares both the legal and equitable title to be vested in the Town of Tome as the confirmee of the grant under the Act of Congress, it would seem that such a judgment would lead to an absurd and unnecessary result in that by such an affirmance it must be decided that the grant was not complete and perfect at the date of the Treaty of Guadalupe Hidalgo, which would be in direct opposition to the plain terms of the Surveyor General's report in his findings as to the character and validity of the grant, as well as the title of the claimants, and also, therefore, in direct opposition to the decision in the Tameling case. Furthermore, the long standing claim of title, dating from the commencement of the grant up to the filing of this suit, would seem to give to the heirs and assigns of the original grantees such a title as should be recognized by any court of equity in line with the decision in the case of United States vs. Chaves, supra.

If, on the other hand, this court construes the grant in the light of the Surveyor General's findings, as well as in accordance with the spirit and intent of the grant, as indicated by the expediente of title, and determines that the Town of Tome holds the legal title in trust for the heirs, successors and assigns of the grantees of the grant, then the heirs, successors and assigns, as tenants in common, will have the right to partition their common estate and may have their rights adjudicated upon this cause being reversed and remanded to the lower court.

All of which is respectfully submitted.

RICHARD H. HANNA,
FRANCIS C. WILSON,
Counsel.

Dated, Santa Fe, New Mexico, October 1, 1912.

3

REPLY BRIEF FOR APPELLANTS

Supreme Court of the United States

October Term, 1912

No. 558

George W. Bond, et al., Appellants

vs.

Unknown Heirs of Juan Barela, deceased, et al., Appellees.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

RICHARD H. HANNA,
FRANCIS C. WILSON,
Attorneys for Appellants

In the Supreme Court of the United States

OCTOBER TERM, 1912

George W. Bond, et. al.,
Appellants,
Unknown Heirs of Juan Barela, Deceased, et. al.,
Appellees.

REPLY BRIEF.

With reference to the statement of the case appearing in defendant's brief, we desire to submit that the matter set out in the first paragraph is in no sense material and could have formed no part of the statement of the case by the plaintiff. Since, however, the attorney for the appellees has seen fit to raise the point, we desire to call attention to the fact that the dilapidated condition of the original act of possession was such that the Surveyor General himself in his report stated that the original act of possession was "so much eaten by mice" that it was not legible. The certified copy used by the Surveyor General was made in 1836, and the original, then nearly one hundred years old, was not sufficiently legible for an accurate copy to be made. These are matters of record since the condition of the original was commented upon by the Surveyor General in his report, and the names which appeared in the copy of the act of possession were probably not properly copied from the original, which was not legible. At this late date it will not be presumed at any rate that the alcalde, who placed the grantees in possession ,did not act within his authority.

Strother v. Lucas, 12 *Pet.* 138, 8 *L. Ed.* 1147.

In that portion of the act of possession containing the preliminary recitals, the alcalde states as to the identity of the parties to whom he gave possession that "the parties concerned being together, * * * and all being present, etc.," he proceeded to give them possession. This recital in itself

would seem to be sufficient to prove that the parties to whom the Grant was made, or their representatives, were present to receive possession. Moreover, our view of the matter, as set out in our affirmative brief, is, that the recitals of the Surveyor General in his findings that the Grant was made to Juan Barela and his companions and that their heirs, successors and assigns had had undisturbed possession of the same for one hundred and seventeen years, settles the question for all time as to whom the Grant was made and as to whom the Grant enured after the Act of Congress was passed confirming the Grant.

The second criticism contained in appellee's brief, is to the effect that the complaint does not sufficiently allege the origin of the title to the land in the plaintiffs. We call attention to the fact that the patent which was made a part of the complaint recites that the claim (Tome Grant) is entered in the report of the Surveyor General of New Mexico and is thereon reported upon favorably and that the claim was confirmed by Act of Congress, approved December 22, 1858. The contents of the report made a part of the Act of Congress, of which the court will take judicial notice, are sufficient to show the origin of the title under which plaintiffs claim rises. We understand that it is not necessary to allege probative facts such as how plaintiffs acquired their one-half interest, nor matters of which the court will take notice such as the act of confirmation, which includes, by reference, the Surveyor General's report.

It seems hardly necessary to cover again the ground gone over by counsel for appellees in his brief on page 2. We have already stated in our brief that the allegations of the answer are ambiguous in that from that pleading it would appear that it was the inhabitants of the town of Tome who petitioned the Surveyor General, whereas the record shows that the petitioners before the Surveyor General claimed as the heirs, successors and assigns of the original grantee, to whom, as they allege, the Grant was made in fee, the exact words of the petitioners being: "Your petitioners further state that the Town of Tome is situated on said Grant and the residences and farms of your petitioners who have inherited the same from the original grantees or acquired them by purchase," and in the preceding sentence that "said Grant was made by said petitioners and their heirs in fee and was duly taken

possession of by said grantees in accordance with the forms of law then in force, and has ever since that time been in the quiet and peaceable possession of said grantees, their heirs and assigns, without any adverse claim of any kind from any source whatever." Thus it appears that the allegation in the answer of the Town of Tome to the effect that the inhabitants of Tome petitioned to the Surveyor General omits the most essential elements of the petition since the allegations in the petition show that the petitioners were claiming as heirs and assigns of the original grantees, and were asking for a confirmation to themselves and not to the Town of Tome. The reply merely denies the ambiguous allegations and sets up the facts as the petitioners alleged them in their petition before the Surveyor General.

Counsel for the appellees insist that the plaintiff's denial of the existence of the Town of Tome as a municipality under the laws of Spain and Mexico was unnecessary and erroneous for the reason that the court would take judicial notice of the fact of such existence. We regret that counsel has contented himself with this positive statement without citing authority since we have been unable to discover any case in which the court has gone that far. It is true that the courts of California, New Mexico, Arizona and the Supreme Court of the United States have taken judicial cognizance of the public laws and acts of Spain and Mexico, and in the case of Louisiana and Missouri the courts have taken judicial notice of the laws of France, which were in effect at the time the territory included within those states formed a part of and was under the jurisdiction of those countries, but after as thorough a search as were capable of making, we have failed to discover a case where the courts have gone so far as to take notice of the existence of the fact that a town was incorporated under a former sovereignty. It should be noticed that the statement of the defendant is, in effect, that this court would take notice of the fact that the Town of Tome existed as an organized municipaliy under the Spanish government over two hundred years ago. The law is well settled that where cities and towns are incorporated by virtue of a general statute, the courts, while they will take notice of the statute, will not take notice of the fact that a particular town or place has in-

corporated under it and this fact must be proved as any other fact.

Hopkins v. Kansas City Ry. Co., 79 *Mo.* 98.

State v. Cleveland, 80 *Mo.* 108.

Johnson v. Common Council, 16 *Ind.* 227.

Temple v. State, 15 *Tex. App.* 304.

Patterson v. State, 12 *Tex. App.* 222.

Was the Town of Tome constituted a municipality by name under a public law of Spain? If so, undoubtedly the court will take judicial notice of this fact, but such a statement appears nowhere in the record. If it existed at all, it must have been under some general law and the rule enunciated in the above cases would apply. Therefore, a denial of the allegation of its existence as a municipality under the laws of Spain would compel proof of that fact.

The criticism by appellee's counsel of the other denials contained in the reply seem equally without foundation. The incorporation of the Grant as alleged in the answer, was carried out under the statute and the reply denies that the Grant was ever incorporated according to law, or has ever existed as a lawfully incorporated body. The proceeding being statutory, the plaintiff had a right to place upon the defendant the burden of showing that the statute had been complied with. There is a further allegation in the reply in connection with this paragraph that the trustees under the alleged incorporation have been guilty of official acts of misconduct and have appropriated to themselves the proceeds of the sales of the common lands, thereby destroying the common estate of the plaintiffs. Whether or not the trustees had so failed in their duty, or whether or not they had so grafted from the real owners of the land is a question of fact, and if proven will certainly sustain the action of the plaintiffs in bringing a suit to partition the Grant, for it is evident that if their common estate has been dissipated by such transactions, they should and could have their remedy in partition proceedings so that they might prevent such violations of trust in the future, call upon the trustees for an accounting, and preserve the balance of their estate from such unlawful and fraudulent acts by having their separate interests decreed to them.

On pages 6 to 13 of the brief for appellees is found an abstract discussion of the character of the Grant, all of which we submit can be of no weight in view of the findings of the Surveyor General that the Grant was made to Juan Barela and his companions; that they were duly placed in possession of the entire tract, and that their heirs and successors had been in peaceable and undisturbed possession of the tract for one hundred and seventeen years. Throughout appellee's brief we find that counsel for appellees has taken an inconsistent position. On the one hand, it will be found that counsel strives to show, contrary to the above specific findings, that the Grant was not made to Juan Barela and his companions, that they were not placed in possession of the entire tract, and inferentially at least, that their heirs and successors had not had peaceable and undisturbed possession for a period of one hundred and seventeen years, and on the other hand, counsel argues that the confirmation by Congress is an adjudication which cannot be disturbed, citing the Tameling case, already cited by appellant (page 14, appellant's brief), and repeating from that case the statement of the Supreme Court that it is "not the duty of this court to sit in judgment upon either the recital of matters of fact by the Surveyor General or his decision declaring the validity of the Grant." According to counsel's own exposition of the law he is clearly in error in attempting to overturn the findings of the Surveyor General.

After a careful examination of appellee's brief, we fail to find that counsel has met us upon the proposition that the lower court sitting as a court of equity should have construed the confirmation as one for the benefit of the claimants before the Surveyor General whom that official, by his findings of fact, plainly held to be entitled to the Grant. Notwithstanding the iteration and reiteration of our position in this respect, counsel insists on regarding our endeavor to have the confirmation construed in the light of the plain intent and legal import of the Surveyor General's report, as one to set aside the confirmatory act. We concede that the legal title is, by virtue of the confirmation ,in the Town of Tome and that it is beyond the power of the court to alter that fact. However, Congress provided in the act of confirmation "that this confirmation shall be construed as a relinquishment of all title and claim of the United States

to any of said land, and shall not affect any adverse valid right, should such exist." The patent, therefore, is nothing more than a quit claim deed, and it is left to the courts to determine to whom the title of the patentee shall enure. We submit that the report of the Surveyor General settles the latter question in the case at bar beyond question in favor of the heirs and successors of the original grantees. Appellants are not claiming the legal title as against the confirmee, the Town of Tome, but an equitable interest in common in the common lands of the Grant. The patent vested the legal title in the patentee, but did not determine the equitable relation between the patentee and third persons. (Cases cited on page 40 of appellant's brief.)

Recurring to page 12 of appellee's brief ,a reference is found to Hall's Mexican Law, 18, Sec. 33, and it is suggested that therein may be found an explanation of the expression, "whoever may have a right thereto," used by the Governor in his Grant. The section referred to reads as follows:

> "Sec. 33. Law Second: ThatGives the Manner of Making the Apportionments in New Settlement. To those who in the new settlement of any province may have lands and house lots in a town, other lands and house lots can not be given in another town, unless they should leave the first residence, and go to live in that which should be more recently settled; save if in the first they should have lived the four years required to obtain the title, or should leave said lands, and should not avail themselves of them by not having completed the four years' residence; and we declare the apportionment which shall be made contrary to the decision of this law to be null, and we condemn those who shall have made it to the penalty of our mercy and ten thousand maravedis for our house."

We do not understand what application could be made of the above section to the language of the Governor quoted by counsel, but we find that Sec. 35, on page 19 of the same work, is more enlightening upon this subject. This section is as follows:

> "Sec. 35. Law Fourth: That the Viceroys May Give Lands and House lots to Those Who Go to Settle. If in

that which is already discovered in the Indias, there should be any places (sitios) and districts so good that it may be proper to found settlements, and any persons should make application to settle and reside in them, in order that with a greater will and profit they may do so, the viceroys and presidents may give them in our name lands, house lots and waters, in conformity with the disposition of the land; provided it be not in prejudice to third parties, and that it be for the time which may be our will."

The above proviso seems to be intended to prevent conflicts with grants already made to other settlers. Similar words will be found in many of the older grants made by Spanish Governors, and their purport seems to be that the Grant shall be made subject to the prior rights of grantees occupying adjacent grants ,if conflicts resulted.

We find that the remainder of the ground covered by appellee's brief has been anticipated by our affirmative brief as fully as we believe to be necessary. In closing, however, we desire to again call attention to the fact that contrary to counsel's statement, found on page 13 of appellee's brief, to the effect that the cases depended upon by the Supreme Court of New Mexico in its opinion are the same as to the allotments as in the case at bar, the act of possession in this case bears no resemblance to those in the former cases, in that the alcalde in the Tome case specifically states that he placed the petitioners in possession of the entire tract, and made the allotments for the sole purpose of promoting "peace, tranquility and harmony" among them, whereas the officials in the cases depended upon by counsel for appellees plainly indicated the limitations of the Grant by giving possession to the settlers only of the allotments.

Respectfully submitted,

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RICHARD H. HANNA,

FRANCIS C. WILSON,

Counsel.

Dated ,Santa Fe, New Mexico, December 2, 1912.

BRIEF FOR APPELLEES

Supreme Court of the United States

October Term, 1912

No. 558

George W. Bond, et al., Appellants

vs.

Unknown Heirs of Juan Barela, deceased, et al.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO

FRANK W. CLANCY,
Counsel for Appellees

SUBJECT INDEX.

LIST OF CASES REFERRED TO.

In the Supreme Court of the United States

OCTOBER TERM, 1912

George W. Bond, et. al., Appellants,
vs.
Unknown Heirs of Juan Barela, Deceased, et. al.

STATEMENT OF THE CASE.

Appellants' statement of the case does not appear sufficient. Attention is called at the beginning to the failure to make any reference in that statement or anywhere else in appellants' brief, to the important fact that judicial possession, essential to investiture of any title, was not delivered to all of the 29 persons, alleged to be grantees of the tract of land in question, under all of whom, as grantees of a Spanish grant, appellants claim, but was delivered to only 21 of them together with four other persons under whom appellants do not claim, and whose heirs are not made parties.

There is no good reason for thus ignoring this fact as it was fully presented in the supreme court of New Mexico, and is made, in the opinion of that court, (record, p. 48), a principal part of the foundation for the conclusion reached. This will be hereinafter discussed under the heading as to the nature of the original grant.

This is a suit for partition begun in the district court of Valencia County, New Mexico, by 85 plaintiffs against the unknown heirs of 29 named persons, all deceased, and the unknown owners, the unknown proprietors, and the unknown owners and proprietors, of the premises described in the complaint, and the unknown claimants of interest in the said premises adverse to plaintiffs. The complaint sets up that on April 5, 1871, the United States issued its patent for the land commonly called the Tomé Grant, or the Town of Tomé Grant, containing 121,594.53 acres. By an ex-

hibit with the complaint, a copy of the patent, it appears that the patent was issued to the "Town of Tomé." The complaint then alleges that plaintiffs are owners in common of an undivided half of the grant; that 29 persons whose unknown heirs are made defendants, formerly owned an undivided part, share and interest in common in the grant; that their heirs, assigns and legal representatives now claim some undivided interest in the grant, but the names, places of abode and amounts of interests of all and any of them are unknown to plaintiff. Then follow allegations on information and belief, of the existence of unknown owners and proprietors of the grant and of unknown claimants of interests therein adverse to plaintiffs, who are all made defendants.

It is to be noted that the complaint is strangely indefinite as it makes no statement of the origin of the title to the land, beyond the allegation of the issuance of a patent by the United States, nor any statement whatever as to how plaintiffs acquired their alleged one-half interest.

The Town of Tomé appeared and answered. Its answer begins on page 9 of the printed record. Defendant admits that the patent was issued, averring in addition that it was to the Town of Tomé. Defendant denies that plaintiffs own any interest in the grant, and denies that the 29 persons mentioned in the complaint, ever owned an undivided interest in the grant, but adds that they were all severally interested in the grant. This last is erroneous, however, as appears by the grant papers, made a part of the record by stipulation, as only 21 of them were given any land. By way of new matter, defendant then proceeds to plead the making of a grant, in 1739, by the Governor and Captain General of New Mexico, and the delivery of juridical possession by an alcalde who assigned to each grantee in severalty a sufficient quantity of land to plant one fanega of corn, two of wheat, a garden and house lot. A translation of the grant papers appears at pages 17 to 21 of appellants' printed brief, and also in the opinion of the court below, beginning on page 34 of the record. The answer further alleges the presentation, in 1856, by the inhabitants of Tomé, of a petition to the Surveyor General, under the act of Congress of July 22, 1854, asking for the recognition and perfecting of their title; the favorable decision of the Surveyor General,

approving the grant to the said Town of Tomé, and the confirmation of the claim by Congress in 1858, which petition and decision are in the record at pages 12-13, and in appellants' brief at pages 11-13. It is also alleged that the Town of Tomé was an organized municipality under the former governments. Then follows a statement of the incorporation of this defendant in 1892 under the act of the legislative assembly, approved February 26, 1891, as shown by case No. 1166 on the docket of the same court in which this suit was begun, and the consequent vesting in defendant of title to all land in the grant not already held in private ownership. The answer further alleges that there are 400 or more persons holding lands in severalty within the grant, and closes with an assertion of possession by defendant, adverse and hostile to the whole world, ever since its incorporation in 1892, of all lands in the grant not held and owned in severalty as already stated. This last allegation is nowhere denied by plaintiffs.

Answer was also made by 392 individual defendants, (Record, p. 14), who answer the complaint the same as the Town did, and, by way of new matter, after adopting the affirmative allegations set out in the answer of the Town, further allege that they are owners in severalty of portions of the tract of land, and that nearly all of the land not held in severalty, consists of land used for pasture in common by all the parties beneficially interested in the grant, under the general management and control of the board of trustees of said Town of Tomé; that any partition of said pasture land would be impracticable, and a sale, as prayed in the complaint, would be destructive of the value of said pasture lands to the whole community of the Town of Tome

To these answers plaintiffs demurred, (Record, pp. 15-16), because the allegation of the incorporation of the Town of Tomé is not sufficient to bar the partition prayed, and because the allegation that the grant is a town grant and therefore not subject to partition, is not sufficient to bar the right of plaintiffs to have partition.

By stipulation (Record, p. 16), the grant papers, including the petition to, and the report of, the Surveyor General, were made a part of the record. Thereafter, on December 14, 1910, the demurrer was overruled. (Record, p. 17.)

On January 22, 1911, plaintiffs filed replies to the new

matter contained in the answers, (Record, pp. 17 to 22), of which, without going into details, it will be sufficient to say that plaintiffs substantially admit the material allegations of fact in the answers, such denials as are set up, being either unimportant or so pleaded as to raise no issue of fact which can be tried. They deny that the persons who petitioned the surveyor general "were inhabitants of the Town of Tomé," although the answer does not so allege, and aver that the petitioners "claimed to be inhabitants of the sitio of Tome Dominguez." The answer describes them as "the inhabitants of Tomé," (Record, p. 10) and the petition to the surveyor general begins "your petitioners, the inhabitants of the sitio of Tomé." The reply also alleges that the sitio of Thomé Dominguez was not limited to the alleged Town of Tomé, but was co-extensive with the exterior boundaries of the grant. All of this is obviously immaterial and not responsive to the answers. The reply denies the existence of the Town of Tomé under the former governments, and demands proof thereof, although such a matter is one of judicial knowledge. They deny that the defendant town "was ever incorporated according to law, or has ever existed as a lawfully incorporated body," without alleging any fact on which this denial is based, although the answers sufficiently set out the proceedings of the incorporation in case No. 1166 in the same court. Then the reply alleges "that the pretended corporation was unlawfully and illegally constituted," without stating why, and has "never had a legal organization and has not been operated in accordance with the law, and that all its acts, as such pretended corporation have been illegal,, void and without binding effect," and that the alleged trustees have been guilty of official misconduct. Comment is unnecessary. Then there is a denial that any title was ever vested in the defendant town, either in 1892 or at any other time, but no denial of the allegation of open, notorious and exclusive possession by defendant, adverse and hostile to the whole world, from 1892 to the present time. There is an allegation "that the heirs, successors and assigns of the original grantees of said grant are the sole owners in common of the common lands of the said grant, by reason of the fact that the title of the said grantees was complete and perfect under and by virtue of the laws of the Kingdom of Spain, and that the Town of Tomé has no right, title or interest in said

lands which a court of equity can recognize, except that of a trustee for the heirs, successors and assigns of the original grantees under and by virtue of the patent," all of which sets up no more than an incorrect conclusion of law.

A demurrer, (Record, pp. 23-24), setting up in detail the objections indicated in the foregoing summary of the reply, was argued and sustained February 3, 1911, (Record, p. 25), and plaintiffs declining to plead further, the complaint was dismissed and plaintiffs appealed. The supreme court of New Mexico affirmed the judgment of the district court, December 19, 1911, and plaintiffs then appealed to this court.

The plaintiffs' contention is that in 1739 the Governor of New Mexico made an absolute grant, equivalent to an English title in fee simple, to the 29 persons who signed the petition to the Alcalde Mayor of Albuquerque, of all the land within the outboundaries of the land of Thomé Dominguez; that that grant was a perfect title, and therefore the confirmation by Congress to the Town of Tomé could have no effect upon it, and that the confirmation and patent to that town, could do no more than create a trust in favor of the heirs, successors and legal representatives of the original 29, of whom it is, perhaps, assumed that plaintiffs are heirs, successor or legal representatives, although this is nowhere asserted in the record, and, indeed, the complaint asserts entire ignorance on the part of plaintiffs (Record, p. 6), of "the respective names and places of abode and residence of all and any of said heirs, assigns and legal representatives of said deceased persons." Plaintiffs do not appear really to have any standing in court.

In opposition defendants contend that no grant in the nature of a fee simple title was made to the 29, or any one else of all the land, 121,594.53 acres, but only of the pieces of land allotted by the Alcalde to each of 25, not 29, persons put in possession, the other lands being reserved for later settlers and for pasture and water for the common use of all, the whole being of the nature of a community or town grant; that the decision of the surveyor general and the confirmation by Congress constitute a final and conclusive adjudication, which cannot be reviewed by any court, that the grant was to a town; and that, being a town grant, it was properly incorporated under the act of the legislative assembly of 1891, hereinafter quoted, the corporation thus created suc-

ceeding to the title, both legal and equitable, to all land in the grant not held in private individual ownership.

POINTS AND AUTHORITIES.

FIRST.

As to the nature of the original grant.

We will first give attention to what appears on the face of the grant papers.

Usually in Spanish grants of the eighteenth century, the would-be grantee petitions the governor for the land desired, but we find in the present case, curiously enough, that the petition is addressed to the Alcalde Mayor of the Villa of Albuquerque, whose jurisdiction was extensive, he being one of the seven Alcaldes Mayores of the whole province, or kingdom, of New Mexico. The petitioners ask the Alcalde to give them the grant which he had caused to be returned to him, evidently from those to whom the land had been previously granted and who had declined to settle thereon. The Alcalde thereupon states he cannot deliver to these petitioners the grant because it had been returned by order of the governor, the implication being that otherwise he might have done what was asked, and therefore he refers the petition to the governor. Here we have a strong indication that there was no intention to give this land to any particular persons, but to have the place established and inhabited by any one who would go there. This intention is apparent in other places in the papers as will be shown a little later. The petition contains nothing to show the extent of the land or its boundaries, but it appears to have been well known by the name of Thomé Dominguez, who had been a captain in the Spanish military service over a century earlier.

We next come to the important thing, essential to the passing of any title, the act of the Governor Mendoza, from whom the title must come. He grants to the petitioners "the land petitioned for, called the land of Thomé Dominguez, for themselves, their successors and whoever may have a right thereto under the conditions and circumstances required in such cases, and which is to be without prohibition to any one desiring to settle the same"; and he orders the Alcalde Mayor to "place them in possession of the aforementioned lands, giving in all cases to each one the portion he may be

entitled to in order to avoid difficulties which may occur in the future."

This is the language which appellants' counsel repeatedly assert, in varying forms of language, conveyed the whole tract to the petitioners in fee simple! What would be said of the effect of a deed today, conveying a hundred acres of land to Harry Hanna and Francis Wilson "for themselves, their successors and whoever may have a right thereto"? Could it be contended for a moment that such a deed would vest an absolute title in said Hanna and Wilson, or that it evinced any intention on the part of the grantor to give such a title to them? Would it not be apparent that the grantor had in mind oher persons equally entitled to the land? And if he should add that the transfer is "without prohibition to any one desiring to settle" the land, how much of a title to the whole tract could the grantees claim? And if he further directed his agent to place the grantees in possession, giving "to each one the portion he may be entitled to," and the agent gave each ten acres to plant and build on, would any sane man say that title was made to more than the portions so given and accepted by the grantees?

The grant as made by the governor can harmonize only with an intention to create a community made up not only of the 29, but of any other competent and proper persons who might join them either at that time or at any later day. It is difficult to conceive of language which could make this intent plainer, and yet to the minds of appellants' counsel, judging from their printed brief, the order of the governor vested absolute and perfect title in the 29, to the whole tract, although possession was never delivered to the 29 of any of the land, but only to 21 of them.

But appellants' counsel appear to rely even more, if possible, upon the act of juridical possession, which we will next consider, first calling attention to the fact that the strength of such argument as they make based upon it, depends upon taking it separately and apart from the act of the governor which alone gives it life, and regarding it as a conveyance. Even when thus taken, it is not sufficient to support plaintiffs' contention.

This act of possession begins "In the new settlement of Nuestra Senora de la Concepcion de Tomé Dominguez, instituted and established by Don Gaspar Mendoza." This

language is not without meaning in our present discussion. The word translated as "settlement" is, in the original, "*Poblacion*," which has not always quite the same meaning as our word "settlement." It may have a much more extended and different meaning, such as a city, town or village, although these English words are not altogether exact. The following definitions from the standard Dictionary of Terreros, published in the eighteenth century and far superior to anything of the kind then extant in English, will be instructive:

> Poblacion, el lugar, ó habitadores mismos.
>
> Lugar, se toma por Ciudad, Villa ó Aldea.
>
> Ciudad, *poblacion* numerosa, que suele estar cercada de murallas, y que goza de ciertos privilegios, y derechos.
>
> Villa, lugar bastante populoso, con calles regulares, y con algunos privilegios, y que suele esta murado de modo, que es como un medio entre Ciudad y Aldea.
>
> Aldea, lugar que carece de los privilegios de Ciudad y de Villa, habitacion de Aldeanos.
>
> Paraje, lo mismo que lugar, sitio, estancia.
>
> Sitio, lo mismo que lugar, silla, asiento.

In the great work of Joaquin Escriche, edition of 1847, we find the following:

> Villa. La *poblacion* que tiene algunos privilegios con que se distingue de la aldea, como vecindad y jurisdiccion separada de la ciudad.
>
> Aldea. Lugar corto sin jurisdiccion propia, que depende de la ciudad ó villa en cuyo distrito esta situado.
>
> Lugar. Generalmente significa cualquier sitio ó parage y cualquiera ciudad, villa ó aldea, pero rigorosamente se entiende por lugar la *poblacion* pequeña menor que villa y mayor que aldea.

It will be seen that "poblacion" has, as already stated, a different and more extended meaning than our word "settlement." It may mean a *ciudad*, or a *villa*, or an *aldea*, or a *lugar*, all distinctly recognized entities in Spanish law, which in English might be called "cities" or "towns." This was

the sort of thing which Juan Gonzales Bas meant when he spoke of the "*Poblacion*" "instituted and established" by Don Gaspar Mendoza, and this harmonizes with the obvious intent of the governor that others than the 29 were to become part of the "*Nueva Poblacion*," and accounts for part of what the alcalde did as will be hereinafter shown.

Confirmation of this meaning of the word "poblacion" is to be found in the Recopilacion de las Leyes de las Indias. Law 1 of Title XI of Book IV is as follows:

> Declaramos, que las Ciudades, Villas y *Poblaciones* de las Indias puedan nombrar Procuradores, que assistan a sus negocios, y los defiendan en nuestro Consejo, Audiencias y Tribunales, para conseguir su derecho y justicia, y las demas pretensiones, que por bien tuvieren.

The Alcalde Mayor proceeded to deliver possession in accordance with the decree of the governor, but not to the 29 petitioners as appellants' counsel assert. He uses no word to indicate such delivery, or the presence of the 29. He merely says "the parties concerned being together, I proceeded to the above-mentioned place and all being present, I notified them of the decree." The "above-mentioned place" is the Nueva Poblacion established by the governor. It will be hereinafter shown that all of the 29 were not there, and that therefore there is nothing to support appellants' contention as to the title, which is based entirely upon a part of the act of possession, taken separately from the remainder and without any regard to the governor's decree. That part is as follows:

> "I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned of 'Nuestra Señora de la Concepcion de Thomé Dominguez,' whose titular feast they promised to observe and celebrate every year. And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition, which are as follows; on the west the Del Norte river, on the south the place commonly

> called, 'Los Tres Alamos,' on the east the main ridge called Sandia, and on the north the point of the marsh at the hill called Tomé Dominguez; at which principal boundaries I ordered them to perpetuate their existence with permanent landmarks, pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be used without any dispute, with the condition that each one is to use the same without dispute in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounced this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances."

Appellants insist that the foregoing invested the 29 with a complete and perfect title to the whole tract within the boundaries named, the delivery of possession relating to the whole tract, and not to any portions of it. This construction would find some support in part of the language used, if the 29 had been present, and if it did not ignore the limitations and restrictions imposed by the governor, already pointed out, and also the remainder of the act of possession. The Alcalde could not have intended to exceed the authority given by the governor, and all that he did must be considered and construed in the light of what he was authorized to do, because, if he went beyond what the governor directed to be done, his act would be a nullity. Authorities are hardly necessary for this.

Pinkerton v. Ledoux, 129 *U. S.* 354.

Such a construction also ignores the language used as to the "common pastures, water and watering places," which clearly indicate an intention that they should remain free for the use of all who may have any lands within the grant, —not only those then put in possession, but those indicated by the governor's phrase, "whoever may have a right thereto," and by the non-prohibition as to later settlers.

Still more significant, however, is the fact that this construction ignores what is apparent on the face of the re-

mainder of the act of possession which is fatal to plaintiffs' theory.

Examination of the act of possession in connection with the antecedent papers, discloses internal evidence of the incorrectness of the contention of appellants as to the nature of the grant and the title vested by it. By reference to the original petition addressed to the justice of Albuquerque, it will be found that there are 29 signers to that petition, who asked for the land. The order of the governor, which is the foundation and origin of any claim of title, grants to these petitioners the land asked for, for themselves, their successors and whoever may have a right thereto, and provides that this is to be without prohibition to any one desiring to settle the same. Plaintiffs' contention is that this order of the governor, taken in connection with the act of possession, vested a clear title in the nature of a fee simple estate in these 29 persons, and their suit is brought accordingly against the unknown heirs of the 29 signers of the original petition. This is logical, because if the governor granted any such fee simple title, he granted it to those petitioners. That he did not make any such grant is clearly shown by the action of the alcalde who delivered the possession, as he did not deliver it to those 29 grantees. It will be found that eight of those original petitioners, Joseph Salas, Alonzo Perea, Thomas Zamora, Nicolas Garcia, Francisco Rivera, Juan Antonio Zamora, Joachim Sedillo and Pedro Romero, do not appear in the list of persons to whom the alcalde gave possession, while four other persons, not among the petitioners and alleged grantees, did appear and were given such possession. Those four are Josefa Gutierrez, Gregorio Gutierrez, Jacinta Martin Carrillo and Ventura Romero. Clearly neither the governor nor the alcalde considered that any absolute grant had been made by the governor to any particular person, or the delivery of possession would not have been extended so as to include persons whose names had not theretofore appeared. As to the eight of the original petitioners to whom no possession was delivered, it must be clear, according to appellants' contention at the present time, that they have no title whatever, as the delivery of possession is admittedly a necessary part of the investiture of title.

Van Reynegan vs. Bolton, 95 *U. S.*, 35.

More vs. Steinbach, 127 *U. S.*, 79.

Clearly the four new persons were among those indicated by the governor in the words "and whoever may have a right thereto under the conditions and circumstances required in such cases." There is a law in the Recopilacion de las Indias, which may throw some light on the question of who may have a right thereto."

Law 2, *Title* 12, *Book IV.*

Hall's Mexican Law, 18, *Sec.* 33.

The alcalde, in pursuance of the order of the governor, and, as already indicated, we must interpret his acts in the light of that order, delivered to each of the 25 present, "the portion he may be entitled to," which he determined to be "a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot."

After the foregoing discussion of the grant in this case, it seems impossible to distinguish it, although appellants' counsel attempt to do so, from the one considered by this court in a case of which the writer of this brief retains a painful memory, although he was not much surprised at the decision when it was announced. The only difference noticeable is that in that case, the alcalde put each settler separately in possession of his own suerte of land, which was much smaller than those given at Tomé. He did, however, give them boundaries including much more land, "for their pastures and watering places and with a view to the coming of other settlers and the increase of families and descendants." Notwithstanding this language about other settlers,—similar to what Mendoza ordered,—and the increase of families and descendants, the court held that those lands were not granted.

Rio Arriba L. & C. Co. v. U. S., 167 *U. S.* 298.

U. S. v. Sandoval, 167 *U. S.* 278.

U. S. v. Peña, 175 *U. S.* 500.

An attempt is made in appellants' brief to distinguish the above cited cases which are relied upon in the opinion of the

supreme court of New Mexico, from the present case by asserting that confirmation in those cases was refused because it was held that the grants were inchoate and incomplete under the former governments, and made with a reservation of title in the common lands which passed to the United States upon the cession of New Mexico (Plaintiffs' Brief, p. 16). An examination of the opinions of this court in the cases cited will develop nothing to support the assertion that it was held that the grants were inchoate and incomplete under the former governments. The grants were held to be quite complete and perfect, that is to say, to the extent of the allotments made to the persons who were put in possession. No question was made as to the completeness of their titles to those allotments, but it was denied that the grant extended to anything more. This was the condition of the grant now under consideration when it was acted upon by congress. The titles were complete as to the allotments made by the Alcalde. As to the remainder of the lands within the outboundaries, congress parted with the title of the United States by the act of confirmation, and gave this land to the town of Tomé. As far as can be gathered from the Recopilacion de las Indias, when towns were established by official authority, as Governor Mendoza established the Nueva Poblacion de Tomé, no particular form of procedure was laid down, but the governor, as the representative of the king, seems to have been at liberty to proceed as in his discretion appeared proper, in conformity with the general idea of giving to each settler the amount of land which he could cultivate and which should be absolutely his, with the reservation for the benefit of future settlers of any other agricultural land, and with a large amount of common lands for the use of the whole community for wood, water and pasture. However rude and imperfect the proceedings may be, yet these general principles must govern, and the court will take judicial notice of the fact that prior to the granting of the lands at San Miguel del Vado, considered in *U. S. v. Sandoval*, 167 *U. S.* 278, there was no great amount of formality in the procedure adopted after the reconquest in the creating or resettlement of villas and towns in New Mexico.

SECOND.

The Confirmation by Congress is an Adjudication Which Cannot be Reviewed in the Courts.

Under the first point of this brief, it is quite clearly demonstrated that Governor Mendoza never gave any absolute title to the 25 persons to whom possession was delivered, beyond the portion of the land assigned to each of them, and that his intention was to create a new town, which, at later periods, we find historically in existence with an ayuntamiento and other officers, but if this were not entirely clear, —if there remained any room for doubt so that it were a debatable question,—the action of Congress has decided that question, and constitutes an adjudication that the grant was made to a town, and that the town was entitled to the land, which cannot be reviewed in any court. That this position is correct, is well supported by decisions of this court. In what is perhaps the leading case on this particular subject, the court, after pointing out that individual rights of property in the territory acquired from Mexico were entitled to protection, and that the duty of providing the mode of securing them and fulfilling the treaty obligations, belong to the political department of the government, and stating that the method provided in California required a judicial examination of all titles to real property, declared that Congress had provided a quite different method as to the adjustment of land claims in New Mexico, by means of procedure before the Surveyor General who was to make a report to be laid before Congress, and then speaks as follows:

> "It will thus be seen that the modes for the determination of land-claims of Spanish or Mexican origin were radically different. Where they embraced lands in California, a procedure, essentially judicial in character, was provided, with the right of ultimate appeal by either the claimant or the United States to this court. No jurisdiction over such claims in New Mexico was conferred upon the courts; but the surveyor-general, in the exercise of the authority with which he was invested, decides them in the first instance. The final action of each claim reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other forum.

It is obviously not the duty of this court to sit in judgment upon either the recital of matters of fact by the surveyor-general, or his decision declaring the validity of the grant. They are embodied in his report, which was laid before Congress for its consideration and action."

Tameling v. U. S. Freehold, etc. Co., 93 *U. S.* 662.

U. S. v. Maxwell Land-Grant Co., 121 *U. S.* 366.

Lafayette's Heirs v. Kenton, 18 *How.* 198-9.

Astiazaran v. Santa Rita Co., 148 *U. S.* 82.

In numerous decisions of this court, it has been repeatedly declared that as the duty of protecting property rights in accordance with treaty stipulations, devolves upon the political department of the government, any disregard of treaty stipulations cannot be reviewed in the courts, but the judiciary is bound by whatever Congress may declare. To such an extreme has this been carried, that it was held, as to absolutely perfect titles to real estate in California, that they were lost and became of no effect or validity if not presented to the commission created for the purpose of adjudicating such claims in California. The act creating that land commission made no distinction between imperfect and perfect titles. In several cases this fact had been stated, but the question did not come up squarely for adjudication until 1889. Prior to that time, the state courts of California held that titles to land perfect at the date of the treaty with Mexico, required no action by our government, but that they remained unaffected and unchanged by the cession of the country to the United States. When the matter finally reached this court, it was argued that the act of Congress which provided that all claims not presented to the commissioners, should be deemed, held and considered as part of the public domain of the United States, was invalid, because in conflict with the provisions of the treaty and in conflict with the rights of property under the Constitution of the United States, and that the statute could not have been intended to apply to complete and perfect titles, but only to incomplete and imperfect ones. The court held that so far as the act of Congress was in conflict with the treaty of Mexico, the court

was bound to follow the statutory enactments of its own government and could not set itself up as the instrumentality for enforcing provisions of a treaty which the government of the United States chose to disregard. The court held also that there was no injustice or want of constitutional power, or any violation of the treaty in the means by which the United States undertook to separate public from private lands.

Botiller v. Dominguez, 130 *U. S.* 246-7, 250.

Mitchell v. Furman, 180 *U. S.* 436.

Barker v. Harvey, 181 *U. S.* 486.

Notwithstanding this well-established doctrine, appellants' counsel, at pages 34 to 40 of their brief, attempt to argue that at the time of the cession of the country to the United States, there could be no title in the United States which could by any act of Congress defeat the equity of the heirs, successors and assigns of the grantees; that the change in sovereignty did not alter the rights of the parties, and that the act of confirmation could not destroy the title of the claimants which was complete and perfect at the date of the treaty; that the surveyor general's finding that the grant was to the town of Tomé and should be so confirmed, was an erroneous conclusion of law which the courts will correct, and that the adjudication by the surveyor general and by Congress that the grant was to the town of Tomé can be so reviewed as to make that town a trustee for the benefit of the successors to the alleged original grantees. Even if we could concede that the surveyor general was wrong in his conclusion and in his recommendation that the grant be confirmed to the town of Tomé, and that Congress, misled thereby, confirmed the grant to the wrong party, in utter violation of the rights of the true owners, no remedy for such a wrong can be made available in the courts. This court has repeatedly held that the acts of Congress providing for the adjudication of claims for Spanish and Mexican grants, could be made equally applicable to perfect and imperfect titles, and that as to the method established for such claims in New Mexico, the court should not "sit in judgment upon either the recital of matters of fact by the surveyor general or his decision declaring the validity of the grants," and that the

final action by Congress is "not subject to review in this or any other forum."

It seems unnecessary here to set out the method provided by Congress under the act of 1854, for the ascertainment and adjudication of claims to lands in New Mexico, under titles derived from either of the former governments, as it must be quite familiar to the court. Let us, then, turn our attention to an examination of what was actually done in this particular case which, as above shown, must be binding on the courts.

What we seek, is to be found in plaintiffs' brief, beginning at page 11, where the petition which initiated the proceeding before the surveyor general begins. It will be seen that the petition purports to be made by "the inhabitants of the sitio of Tomé", and sets out that Juan Barela and others in 1739 petitioned the Governor of the Province of New Mexico for a grant of the sitio of Thomé Dominguez, and that a grant of land was made to said petitioners on the 30th day of July, 1739, called the sitio of Thomé Dominguez, of which the boundaries are given. The petition further asserts that said grant was made to the said petitioners and their heirs in fee, was taken possession of and has ever since been in the quiet and peaceable possession of the grantees, their heirs and assigns. The petition further states that the town of Tomé is situated on said grant and the residences and farms of the petitioners inherited from the original grantees or acquired by purchase.

Next we have the decision and report of the surveyor general. This is headed "Town of Tomé", and the first paragraph is "The claim of this town was filed in this office on the 6th day of August, 1856." The surveyor general then goes on briefly to state what was done in 1739, that the grant papers appear to be genuine and that the heirs and successors of the parties to whom the grant was made have been in peaceable possession of the land for 117 years. He then says that the governors of territories under the Spanish Government had the power of distributing public lands and that this grant was made in pursuance of the power so vested, "and the grant to the said town of Tomé is therefore approved and the Congress of the United States respectfully recommended to confirm the same, causing a patent to issue therefor by the proper department, and that the land em-

braced within the limits set forth in the grant be surveyed." It is quite clear that the surveyor general treated the claim as one made by or on behalf of a town, and that he approved it as a grant to the town and recommended that Congress confirm the grant to the town. Congress did confirm the claim as the claim "of the town of Tomé" (Appellants' Brief, p. 9), and directed the commissioner of the land office to issue instructions for the survey of the claim and to cause a patent to issue therefor. We must assume that the necessary instructions were given and the survey made, as we find that a patent was issued on April 5, 1871, to the town of Tomé, covering the land in question. (Record, pp. 7-8). Taking all these proceedings together, there is no escape from the conclusion that there has been an adjudication by the political department of the government that this grant was a grant to the town of Tomé, and that the title is vested by that adjudication in the town of Tomé, and that this is absolutely conclusive upon the courts.

It is also clear, however, that as to land outside of that which was allotted to, and occupied by, actual settlers prior to the cession of the country to the United States, the title to which may be considered as still remaining in the former governments and as passing to our government in 1848, the United States by act of confirmation, survey and patent which was executed forty years ago, has relinquished all title to the town of Tomé.

Practically all that is urged by plaintiffs' counsel in opposition to the foregoing views, is that the surveyor general's conclusion "that the grant was to the town of Tomé and should be so confirmed is, obviously, in view of his findings, an erroneous conclusion of law, which courts of equity will always correct by such a construction of the law as will prevent injustice from resulting," (Appellants' Brief, p. 36) but this is an attempt to impeach and review the adjudication by the political department of the government. The decision of the surveyor general is, as plaintiffs' counsel assert, "as much a portion of the act as though written into it," (Appellants' Brief, p. 14) and yet it is sought now to attack the action of the surveyor general which was adopted by Congress, as erroneous. Appellants' counsel appear to think that it is only "the recital of matters of fact by the surveyor general" which are binding upon, and not reviewable by the courts, over-

looking the fact that this court regards "his decision declaring the validity of the grant" in the same light.

Tameling v. U. S. &c. Co., 93 *U. S.* 662.

No attempt will here be made to review the argument of plaintiffs' counsel upon which they base their conclusion of error on the part of the surveyor general, because it is quite fully covered in substance by what is hereinbefore set forth, and also because of the manifest impossibility of successfully assailing the adjudication of the title under the direction of Congress and by Congress itself in the final act of confirmation.

THIRD.

The Territorial Statute of 1891 is Valid.

A part of plaintiffs' brief, beginning on page 40, is devoted to an attempt to show that the act of the legislative assembly under which the defendant town of Tomé was incorporated, is unconstitutional, because, under it, "without judicial action of any nature, the heirs and assigns of the original grantees could be deprived of their inherited interest in the common lands against their wishes and without an opportunity to be heard in their own defense." This position, however, it will be seen, when the statute is referred to, is based entirely upon the assumption of absolute ownership of the whole tract of land by the heirs and assigns of the 29 persons whom plaintiffs call the original grantees. It is respectfully submitted upon the strength of what has already been set out in this brief, that this assumption is not well founded, and that there never was any such absolute title. It has been demonstrated by a careful examination of the grant papers, that Governor Mendoza made a grant not alone to the 29 petitioners, but also to others, whoever they might be who had a right, and also to such persons as might thereafter come in and settle upon the land. It has been also shown that 8 of the 29 were not put in possession by the alcalde, and that 4 other persons were put in possession, thus corroborating what is urged as to the action of the governor, showing the intention to be to create a town or community to which there might be added from time to time new settlers as long as there were lands which could be allotted for purposes of cultivation. It has been shown that on these papers the surveyor

general of New Mexico treated the grant as one made to a town, as one claimed by a town, and therefore recommended confirmation to a town, which was accepted by Congress, and the land was confirmed and patented to a town. It is of interest in this connection to note the fact that the record discloses that there are 392 persons now claiming to be owners of lands in severalty within the grant, which they cultivate and upon which they live, making use of the outside lands as common pastures, and it must be evident that the 25 small holdings which were allotted in 1739 could not be enough for these 392 persons and cultivators of land.

So much of the act of 1891, which is printed as chapter 86 of the session laws of that year, as is material to the consideration of this point, is as follows:

> "Section 1. The owners or proprietors of any tract or grant of land in this territory, ceded or granted by the governments of Mexico or Spain to any colony, community or town or to any person or persons, for the benefit of any town or colony community who shall within five years next after the passage of this act accept the benefits of the provisions of this act in the manner hereinafter designated, shall become a body corporate and politic, with all the powers hereinafter granted and for the purposes hereinafter mentioned, and shall have perpetual succession.
>
> "Sec. 2. Any ten or more of the owners and proprietors of any such land grant or real estate so held in common as a colony community or town grant, as aforesaid, may within five years from and after the passage of this act, and not afterwards, file in the office of the clerk of the district court of the county in which such land grant or real estate (or the greater part thereof, if the same be situate in two or more counties) is situate, a petition setting forth the names and places of residence of all persons claiming or owning any interest in the said land grant or real estate who are known to the petitioners, a description of the said land grant or real estate by metes and bounds according to an actual survey thereof, if the boundaries of such land grant have been definitely fixed by an actual survey, but if no such survey has been made by the proper authority, then such land grant may

be described by any other description which will reasonably designate the land grant and the name by which it is commonly known in the vicinity of its location, and the nature and extent of the title under and by virtue of which such land grant or real estate is held and claimed, and praying that the owners and proprietors of such land grant or real estate may be created a body politic and corporate, under the provisions of this act."

"Sec. 10. If it shall appear by the certificates of the persons appointed to hold such election that two-thirds of all voters voting at such election voted in favor of granting the prayer of the petition, the judge of the district court shall, on the day named in the notice issued by the clerk of said court, proceed to hear any objections that may be interposed in writing by any person to the fairness of such election, or the right of any person voting to vote thereat, and shall continue such hearing from day to day and from time to time until the same is completed.

"Sec. 11. If no objection be made on the day of such hearing, or if the objections made are found by the judge of the district court to be not well taken, and it appear that two-thirds or more of the qualified voters voting at such election voted in favor of the granting of the prayer of such petition, the judge of the district court shall enter up a decree granting such prayer, and setting forth that the petitioners and their associates and successors are by the said decree created a body politic and corporate under a name to be therein stated.

"Sec. 12. If less than two-thirds of the qualified voters voting at any such election shall have voted in favor of the granting of the prayer of such petition, the same shall be dismissed at the cost of the petitioners."

"Sec. 35. That in all cases where the judge of the district court shall by his decree create a body politic and corporate under the provisions of this act, such action shall be final and conclusive and shall operate to vest in the said corporation and body politic the legal and equitable title to all the land within the exterior boundaries of such grant to which such town or colony community is entitled at the time of the passage of this act, and such corporation shall have full power and authority

to obtain and hold all evidence of title to such lands, and manage and dispose of any and all of such lands in accordance with the foregoing provisions of this act.

"Sec. 36. This act shall not be held or construed to affect any grant of land which is not strictly a colony community grant or a grant to a town or municipal corporation, and when there shall arise the question as to whether the grant which it may be claimed comes under the provisions, does so or not, such question shall be decided by the district court, subject to review in the Supreme Court in an appropriate proceeding, and no proceedings under the provisions of this act shall be held or construed to affect any grant of land or part or portion thereof where the same was made to an individual or individuals in his or their individual rights, or where the same has been confirmed or patent issued for the same to any individual or individuals or his or their heirs or assigns or any or all of them."

The act of the legislative assembly is by its terms applicable only to the owners or proprietors of land granted by the governments of Mexico or Spain to any colony, community or town or to any person or persons for the benefit of any town or colony community as will appear by reference to sections 1 and 36 of the act. Defendants' position is that examination of the original grant shows that the land was granted for the benefit of a colony, community or town, and that not only is this fact to be seen from the original papers, but it has been so adjudicated by the political department of our government and thus settled beyond any possibility of review. It therefore follows that all of the argument of plaintiffs' counsel as to the supposed invalidity of the statute, is entirely aside from anything proper for discussion in this case. By section 36 of the act it will be seen that the act does not affect any grant made to an individual or individuals in his or their individual rights, or where there has been a confirmation or patents to any individual or individuals. There is no attempt by the statute, or by any proceeding under it for the incorporation of the town of Tomé, in any way to interfere with the land which certainly was granted to 25 individuals in 1739 and allotted and pointed out to them, nor with any other land which may have subsequently come into

the possession of other settlers in accordance with the provisions contained in the granting decree of Governor Mendoza, but as to the other lands embraced within the boundaries of the whole tract which was confirmed by Congress, the title thereto, both legal and equitable, has become vested in the corporation, the town of Tomé, as provided in section 35 of the act.

If the grant is such a one as appellants contend, then the statute was never applicable to it, but if the grant were not such a grant, then all of the argument of appellants' counsel about this statute is based upon non-existent premises and needs no further attention.

It must not be overlooked that defendants' allegations that the lands not held in severalty, have been ever since 1892

> "held and claimed by this defendant, and that no claim by suit in law or equity effectually prosecuted has been set up or made to the said lands within the time aforesaid, but that during the whole of said time this defendant has been in the open, notorious, exclusive possession of all of said lands adverse and hostile to the whole world," (Record, p. 11)

have not been denied by plaintiffs and must be taken as true. If true, they are a complete bar to plaintiffs' action. Examination of plaintiffs' reply will show a carefully studied avoidance of any denial of above allegations. They say

> "Plaintiffs deny that both legal and equitable title in said grant, or any part thereof, has vested in the pretended corporate body, the town of Tomé, as alleged in paragraph "G" of defendants' answer, in the year 1892, or at any time prior or subsequent to said year, and that no title has, at any time whatever, been acquired by said defendant as such pretended corporate body by adverse possession or otherwise." (Record, p. 19).

It is respectfully submitted that there is no error in the record of this case in the court below, and that the judgment must be affirmed.

FRANK W. CLANCY,
Attorney for Appellees.

THE facts, which involve the title to a large tract of land in New Mexico, are stated in the opinion.

Mr. Richard H. Hanna and *Mr. Francis C. Wilson* for appellants.

Mr. Frank W. Clancy for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This suit was begun by a petition for partition and to quiet title, filed by George W. Bond and eighty-two others in the District Court of Valencia County, New Mexico, against the unknown heirs of twenty-nine persons named, all deceased, and the unknown owners, proprietors and claimants of the premises commonly called the Tomé grant situate in that county and described as containing 121,594.53 acres. The plaintiffs alleged that they were owners of an undivided half interest.

The town of Tomé appeared and answered, denying any title or interest in the plaintiffs, averring that the grant by Spain was to the town in communal right, was confirmed by act of Congress to the town, a then existing municipality, was so patented by the United States, and was incorporated under the laws of New Mexico; that allotments were made of parts of the land to settlers on the grant in fee in severalty, and ownership of the residue was in the municipality and had been held by it exclusively and adversely since it was patented, April 5, 1871.

Doroteo Chaves, with three hundred and ninety-one others, appeared and answered, denying any individual right in any of the plaintiffs, adopting the answer of the town as to the communal character of the grant, averring that they were themselves severally owners in fee of parts of the grant, and resisting partition.

Translations of the title papers were, by stipulation, made parts of the answers. Demurrers to the latter were overruled, and a reply was filed, to which there was a demurrer. This demurrer was sustained, and, the plaintiffs electing to stand upon their reply, judgment was rendered dismissing the suit. Upon the plaintiffs' appeal the Supreme Court of the Territory affirmed the judgment, 16 New Mex. 660, and on a further appeal the case is now before this court.

The facts are settled by the pleadings. The questions here are, whether the original grant made by the Crown of Spain in 1739 was in fee in individual right or in communal right to the town, title remaining in the Crown except as to specific parcels allotted to individuals, and whether, if it was a grant in individual right, the confirming act of Congress, and the patent pursuant thereto, changed its character.

The facts, as shown by the record, are these: Juan Barela, with twenty-eight others, in 1739 petitioned that the governor "be pleased to donate to them the land called Tomé Dominguez, granted to those who first solicited the same and who declined settling thereon." The governor did "grant to them, in the name of His Majesty, whom may God preserve, the land petitioned for, called the land of Tomé Dominguez, for themselves, their successors, and whomever may have a right thereto under the conditions and circumstances required in such cases, and which is to be without prohibition to any one desiring to settle the same, holding and improving it during the time required by law. In view of which, I should order, and did order, that said senior justice or his lieutenant, whose duty it is, shall place them in possession of the aforementioned lands, giving in all cases to each one the portion he may be entitled to in order to avoid difficulties which may occur in the future."

There was a giving of "juridical possession," a form and

ceremony essential to the passing of title by grant under the Spanish law. The report of the officer conducting this ceremony, so far as here material, is as follows: "In the new settlement of 'Nuestra Señora de la Concepcion de Thomi Dominguez,' instituted and established by Don Gaspar Mendoza, actual governor and captain general of this Kingdom of New Mexico, on the thirtieth day of the month of July, in the year one thousand seven hundred and thirty-nine, . . . the parties concerned being together, I proceeded to the above-mentioned place, and all being present, I notified them of the decree; I took them by the hand, walked with them over the land; they cried out, pulled up weeds, threw stones, as required by law; and having placed the new settlers in possession of said lands, I gave them the title and vocation they should have in the settlement, which bears the name aforementioned. . . . And the first proceedings having been noted, I proceeded to establish the boundaries as contained in the first petition . . . at which principal boundaries I ordered them to perpetuate their existence with permanent land marks, pointing out to them also, as a means of good economy, their common pastures, water and watering places, and uses and customs for all, to be the same without dispute, with the condition that each one is to use the same without dispute, in equal portions, the richest as well as the poorest; and by virtue of what has been ordered, I pronounce this royal possession as sufficient title for themselves, their children, heirs and successors, to hold their lands now and forever at their will; directing them, as I do direct them, to settle the same within the time prescribed by the royal ordinances: and for their greater quietude, peace, tranquility and harmony, I proceeded to point out the land each family should cultivate, each one receiving in length a sufficient quantity to plant one fanega of corn, two of wheat, garden and house lot, as follows:" Here follow nineteen names of original

BOND *v.* UNKNOWN HEIRS OF BARELA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 558. Submitted December 17, 1912.—Decided June 9, 1913.

The proceedings on which the grant involved in this case was issued are substantially the same as those in *United States* v. *Sandoval*, 167 U. S. 278.

Whether the original grant made in 1739 by royal authority of Spain was in severalty or communal, whatever was unallotted passed into the public domain of the United States upon the acquisition of the Territory.

In this case *held* that the confirmation of a Spanish grant under the act of July 22, 1854, on the application of a town claiming to be the owner, passed the title to that town unburdened with any trust for heirs or grantees of persons named in the original petition and royal decree.

16 New Mex. 660, affirmed.

petitioners as given allotments of land, the name Manuel Carrillo appearing twice. Ten of the petitioners were not allotted lands, and among those who obtained allotments were five who were not petitioners.

It is unnecessary to discuss at length the question whether the grant made in 1739 passed a title to the persons therein named to the whole tract, or whether this was merely a grant in severalty of the lands allotted to the persons named in the report showing juridical possession, leaving title to the unallotted lands in the Crown, to be allotted to future settlers. Examination shows that the petition, decree and report of juridical possession are in form substantially like those in *United States* v. *Sandoval*, 167 U. S. 278, wherein the effect of such instruments is discussed at length. See also *United States* v. *Santa Fe*, 165 U. S. 675; *Rio Arriba &c. Co.* v. *United States*, 167 U. S. 298; *United States* v. *Pena*, 175 U. S. 500.

The fact that the governor made the grant "to be without prohibition to anyone desiring to settle the same," that the juridical possession was to be by "giving in all cases to each one the portion he may be entitled to," and that juridical possession and allotment of land was made to persons not petitioning—in the theory of the plaintiffs, not beneficiaries of the decree—while no land was allotted to ten of the petitioners, who, according to the same theory, were beneficiaries, is not explicable on any other theory than that the grant was communal, in which settlers and no others could by allotments obtain individual, several interests. On this construction the omission of allotments to petitioners not identifying themselves with the new settlement would be the necessary consequence, as also would be the allottments to new settlers who were not petitioners.

Had the matter stopped there—had no grant been made by Congress—the grant must have been effective only as to the lands allotted in several right to those named in

the report of juridical possession. Title to and power of disposal over the residue of the land remained in the Crown and passed to the United States upon the acquisition of the territory.

There was, however, Congressional confirmation of the grant. In 1856 the inhabitants of Tomé petitioned the surveyor-general for New Mexico for confirmation of the grant to the town, conformably to the act of July 22, 1854, 10 Stat. 308, c. 103. It was so confirmed by the act of December 22, 1858, 11 Stat. 374, c. 5; and, April 5, 1871, patent issued to the town of Tomé. It is said that the legal title so passed is subject to a trust for the heirs of the original petitioners, who, it is claimed, were beneficiaries of the decree of the Spanish governor in 1739.

As no benefit of that decree, and no title to any of the land, passed to any of the petitioners save those to whom allotments were made, and only to the allotted tracts, no further discussion is necessary. When patent to the entire grant issued to the town of Tomé, title to all the unallotted land passed from the United States to the town unburdened with any trust for heirs or grantees of persons named in the original petition and decree.

Judgment affirmed.